

2544
No. 11992

United States
Court of Appeals

for the Ninth Circuit

POWER SERVICE CORPORATION,
a Corporation,

Appellant,

vs.

W. E. JOSLIN, doing business as CORY-JOSLIN
and MACNSONS,

Appellee.

Transcript of Record


In Two Volumes

VOLUME I

Pages 1 to 400

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court, for the Northern District of
California

No. 26113-R

POWER SERVICE CORPORATION,

a Corporation,

Plaintiff,

vs.

W. E. JOSLIN, d/b/as CORY-JOSLIN AND
MACNSONS,

Defendant.

PETITION FOR DECLARATORY JUDGMENT.
COERCIVE RELIEF AND REFORMATION

Count I.

1. Comes now the Power Service Corporation, a corporation organized and existing under and by virtue of the laws of Minnesota, and a citizen of said State, as plaintiff herein, and brings this action against W. E. Joslin, d/b/as Cory-Joslin and Macnsons, who is a citizen of the State of California, and resident of the Southern Division of the United States District Court for the Northern District of California, as defendant herein.

2. For its cause of action against defendant, plaintiff states that under date of July 11, 1944, a written contract was entered into between plaintiff and the defendant under the terms of which plaintiff agreed, in consideration of the sum of \$448,000.00, to perform all work necessary for the com-

plete erection of the boilers in Power House No. 1, at Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with the plans and specifications, and as directed in writing by the defendant, all within 120 days after the receipt from the defendant of notice to proceed with the performance of said contract; that a copy of so much of said contract as is necessary to a determination of this action, [1*] is hereto annexed, marked "Exhibit A," and made a part hereof.

3. That Paragraph 5-04 of the Specifications attached to and made a part of the above described contract, under the heading "Materials to be Furnished," provides as follows:

"5-04. (a) Materials Furnished by the Constructor. In general, all materials, equipment and machinery which will actually be incorporated into the permanent construction will be furnished by the Constructor and/or others. Materials and supplies incidental to the permanent construction, including but not limited to cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment, etc., will be supplied by the Subconstructor without cost to the Constructor over and above the Subcontract price. Fuel for use in testing operating equipment and for putting the plant in operation will be supplied by the Constructor. Materials furnished by the Construc-

* Page numbering appearing at foot of page of original certified Transcript of Record.

tor will be delivered to the Subconstructor at points and in the manner specified. Section VII hereof.

“(b) Immediately after starting work under the subcontract, the Subconstructor shall prepare a ‘list of materials’ including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the Power House in order that shortages may be immediately determined. Such shortages will then be reported to the Constructor for use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the Subconstructor during the progress [2] of the work and Subconstructor will be held responsible for advising the Constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress.

“(c) Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored and which have been subjected to conditions necessitating reconditioning, refinishing, refacing, cleaning, painting, packing (in valves and pumps), and similar work to properly prepare for installation and operation will be reconditioned, refinished, etc., by the Subcontractor as a part of this Subcontract, except however, that such reconditioning, refinishing, etc., shall apply only to defects which have resulted from storage and does not include inherent defects in manufacture or material. Materials, equipment and

machinery which have been broken or otherwise damaged beyond use or repair during storage or which have inherent defects in manufacture or materials caused through no fault or negligence of the Subconstructor will be replaced by the Constructor without cost to the Subconstructor."

4. That Paragraph 1-05 of said Specifications, under the heading "Commencement, Prosecution and Completion," provides as follows:

"1-05. Commencement, Prosecution and Completion. (a) The Subconstructor will be required to commence work under the subcontract within five (5) calendar days after the date of the receipt by him of Notice to Proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be [3] computed from said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph.

"(b) In the event the total payments for work actually constructed by the Subconstructor under the subcontract exceed the original amount of the subcontract, the time for completion of the subcontract will be extended in the proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein.

"(c) When conditions at the site of the proposed

work are considered by the Constructor to be unfavorable to its prosecution, the Constructor may order the Subconstructor in writing to suspend work under the subcontract until the Constructor considers that the unfavorable conditions for the prosecution of the work no longer exist. When the work is so suspended, the time allowed for completion will be increased by an amount equal to the time of suspension as determined by the Constructor.

“(d) If the Subconstructor fails to perform the work at a rate satisfactory to the Constructor, as specified in subsection (a) above by reason of delays in the delivery of materials or supplies essential to such performance, because of war priorities, or, because of conditions existing through no fault or negligence of the Subconstructor, he may be excused for such failure upon the presentation to and the approval by the Constructor of a written statement setting forth distinctly the cause for such failure.

“(e) In case time for completion of the work is increased due to any of the causes specified herein, it is [4] distinctly understood and agreed that the Subconstructor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered and the Constructor will not be liable for any costs or expenses incurred by the Subconstructor as a result of the increased time for completion of the Subcontract.

“(f) Inasmuch as the provisions of the subcontract documents relating to the time for and the rate

of performance of the work and the time for completion of the same are inserted for the purpose of enabling the United States Government to proceed with the construction of the Sunflower Ordnance Works in accordance with its predetermined program of War Effort, such provisions are of the essence of the subcontract.

“(g) No liquidated damages are provided for under the specifications nor will such damages be provided for in the subcontract.”

5. That on the signature page of said contract, and as a part thereof, a clause provides, as follows:

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications.”

6. That as an inducement to plaintiff to submit a bid of \$448,000, based upon an estimate that the contract could be completed within 120 days, and as an inducement to plaintiff to enter into the contract above described, the defendant, by and through his agents, employees and representatives, orally assured and represented to the plaintiff that “nearly all” of the materials required for the work were then stored [5] in Power House No. 1 at Sunflower Ordnance Works, Johnson County, Kansas, or in warehouses adjacent thereto, and that plaintiff would be able at once to commence and proceed, without delay, so far as the availability of ma-

terials was concerned, in the performance of said contract, so as to enable the plaintiff to complete the installation of said boilers within 120 days after commencement thereof, by reason of which defendant thereupon became obligated to furnish all materials for the construction of said boilers in time to avoid any delay to plaintiff in the performance of its contract.

7. That plaintiff received notice from the defendant to proceed with the performance of said contract on July 13, 1944, and thereafter, within the time required by said contract, entered into performance thereof; that at all times since plaintiff was ready, able and willing to perform said contract within the period provided for in said contract of 120 days, to-wit, on or before November 10, 1944.

8. That certain essential construction materials were not in fact in storage as represented to plaintiff, to-wit, certain water wall tubes and water wall headers; that such materials were not obtained by defendant, or made available to plaintiff, in conformity with the specifications annexed to the contract, at the time or times when the same were required for the orderly and efficient performance of said contract, or at the time required by or under the construction schedule filed with the defendant by plaintiff, but were furnished by defendant at intervals of from 16 to 41 days late, as a direct consequence of which plaintiff was delayed in the performance of said contract for a period of 39 days, to-wit, until December 19, 1944.

9. That during said 39 days plaintiff was re-

quired to, [6] and did, maintain an entire construction organization at the above-named project, to pay the salaries and expenses of its supervisory personnel, to rent certain contractor's equipment for an additional period of 39 days, by reason of all of which plaintiff has been damaged in the sum of Thirty-four Thousand Three Hundred Forty-three Dollars (\$34,343.00).

10. That the defendant has stated, asserted and claimed, and now asserts and claims, that he will not pay plaintiff said damages, or any part thereof, for the reason that his failure to furnish said materials, as and when required under the construction schedule, did not delay plaintiff in the performance of its contract; that defendant further claims that in any event the contract specifically provides that he is not liable for damages to plaintiff resulting from delays on his part in furnishing materials as and when required under the construction schedule.

11. Plaintiff further alleges that by reason of the above and foregoing the defendant is making claims adverse and prejudicial to plaintiff's claim for damages on account of the defendant's breaches of said contract as herein alleged; that it is necessary for the protection of the rights of plaintiff to secure a declaratory judgment concerning the construction of said contract, as written, as to whether or not the defendant has breached his contract, and if so whether or not he is liable in damages, and, if so liable, to secure coercive relief in the form of a judgment for the amount of such damages.

12. Wherefore, plaintiff prays that the Court declare and by its decree determine:

(a) Whether or not the delays of the defendant, if any, in making available for installation certain water wall tubes and headers, in conformity with the specifications, [7] constitute breaches of said contract between the parties.

(b) Whether or not the defendant is liable under said contract for damages because of such delays, if any, in furnishing said materials.

(c) Such other and further relief to which plaintiff may be entitled or which may, to the court, seem just and proper.

13. Plaintiff further prays that if the above and foregoing declaration be in its favor, that the Court award plaintiff a judgment for its damages in the sum of Thirty Four Thousand Three Hundred Forty Three Dollars (\$34,343.00), or such part thereof as may be established by the evidence, and for its costs herein incurred, against the defendant.

Count II.

1. If the Court, under Count I, declares and determines by its judgment that under the contract, as written, plaintiff is not entitled to damages under the allegations contained in said Count, then, for the purpose of stating a second cause of action against the defendant, plaintiff hereby repeats all of the facts recited in Paragraphs 1 to 9, inclusive, of Count I, and prays that said facts be taken as a part of this second cause of action to avoid unnecessary prolixity in this petition.

2. Plaintiff states that at the time of making and entering into said contract, it was represented by the defendant, and understood between the plaintiff and the defendant, and their agents and representatives, that all essential materials required for the installation of said boilers were then in storage at the project, so as to enable plaintiff to complete the installation within the time required by the contract, or that if such materials were not so available then in that event that defendant should respond in [8] damages to plaintiff for any delays caused by the failure of the defendant to furnish said materials as and when required under the construction schedule, and that each of the parties contracted with the other upon the belief that such damages would be incurred and that they should be paid if delays occurred because of failure to furnish materials when required, but that when said contract was reduced to writing it was erroneously written in that it did not specifically provide for the payment of damages on account of delays caused by the defendant in the delivery of materials.

3. That in the performance of said contract, commencing July 18, 1944, both parties hereto construed the contract, as written, to authorize the payment by defendant to plaintiff of any damages incurred on account of delays resulting from the late delivery of materials required in the performance of said contract.

4. Plaintiff further states that said contract was incorrectly written by the defendant, or by his agents and representatives who prepared the same,

in that it did not express the mutual intention of the parties, but was executed by the parties under a mutual mistake and belief that the contract, as written, provided that defendant would pay plaintiff any damages caused by the late delivery of materials by the defendant.

5. That in order to make said contract provide for the payment of damages on account of the late delivery of materials by defendant, the special clause on the signature page should be stricken out and Clause 1-05(e) of the Specifications should be amended by inserting thereafter the following clause:

“Provided, however, that if any delays are encountered and are caused by the failure of the [9] Constructor to deliver materials to the site of the project, as herein provided, for use by the Subconstructor at the times required by or under its construction schedule filed with the Constructor, the Constructor agrees to pay to the Subconstructor such damages as it may suffer by reason of such delay.”

6. Wherefore, plaintiff prays the decree of this court directing and compelling reformation of this contract and that the same be reformed to conform to the agreement between the plaintiff and the defendant and to express the true intention and agreement of the parties, and that said contract be reformed in the following respects, to-wit:

(a) That the special clause appearing on the signature page be stricken from the contract.

(b) That immediately following the word "Sub-contract," in the last line of sub-paragraph (e) in Paragraph 1-05 of the Specifications, there be added the following sentence:

"Provided, however, that if any delays are encountered and are caused by the failure of the Constructor to deliver materials to the site of the project, as herein provided, for use by the Subconstructor at the times required by or under its construction schedule filed with the Constructor, the Constructor agrees to pay to the Subconstructor such damages as it may suffer by reason of such delay."

Plaintiff further prays the Court for such other and further relief as to the Court may seem just and proper.

Count III.

1. And, if the Court, under Count I, declares and [10] determines that under the contract as written plaintiff is not entitled to damages for delays in the delivery of materials, and if the Court reforms said contract as prayed for in Count II, then, for the purpose of stating a third cause of action against the defendant, plaintiff hereby repeats all of the facts recited in Paragraphs 1 to 9, inclusive, of Count I, and prays that the same facts may be taken as a part of this third cause of action to avoid unnecessary prolixity in this petition.

2. That by the terms of said contract, if corrected and reformed as prayed for in Count II of this petition, the defendant further agreed that if

any delays were encountered and caused by failure of the defendant to deliver materials at the site of the project, for use by the plaintiff at the time required by or under its construction schedule filed with the defendant by plaintiff, that the defendant would pay plaintiff such damages as it might suffer by reason of such delays.

3. Plaintiff further states that it has duly performed all of the terms and conditions of said contract required by it to be performed, but that the defendant has breached his contract as alleged in Paragraph 8, Count I, and in that he has further failed to pay plaintiff its damages of Thirty-Four Thousand Three Hundred Forty-three Dollars (\$34,343.00), or any part thereof, in accordance with the terms of said contract if and as reformed, and that said sum, with interest from December 19, 1944, at the rate of 6% per annum, is now due the plaintiff.

4. Wherefore, plaintiff prays judgment against the defendant in the sum of Thirty-Four Thousand Three Hundred Forty-Three Dollars (\$34,343.00), with interest thereon at the rate of 6% per annum from December 19, 1944, and for its [11] costs.

/s/ LANCIE L. WATT,

/s/ CHARLES C. SHAFER, JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed June 19, 1946. [12]

EXHIBIT A

L. S. Subcontract Form No. 1. (For use under a F. F. Subcontract for construction of plant).

L. S. Subcontract No. 5. F. F. Construction Subcontract No. 5. Principal Contract. No. W-461-eng-10274.

LUMP SUM
CONSTRUCTION SUBCONTRACT
WAR DEPARTMENT

Constructor: W. E. Joslin, doing business as Cory-Joslin and Macnsons.

Address: Box 36, Kansas City, Missouri.

Subconstructor: Power Service Corporation.

Address: 711 Wesley Temple Building, Minneapolis 4, Minnesota.

Amount: \$448,000.00.

Subcontract for: Complete Erection of Boilers in Power House No. 1.

At Sunflower Ordnance Works, Johnson County, Kansas.

41/3036 [13]

This Subcontract, entered into this eleventh day of July 1944 by W. E. Joslin, an individual of the City of San Francisco in the State of California, doing business under the firm name and style of Cory-Joslin and Macnsons, hereinafter called the "Constructor", with offices at the Sunflower Ordnance Works in Johnson County, Kansas, and Power Service Corporation, a corporation organized and existing under the laws of the State of

Exhibit A—(Continued)

Minnesota, within principal offices in Minneapolis, Minnesota, hereinafter called the "Subconstructor."

Whereas, the Constructor has heretofore, to wit, on the first day of September, 1942, entered into a contract, hereinafter called the Construction Subcontract, with Wm. S. Lozier, Inc.-Broderick and Gordon, hereinafter called the Architect-Engineer-Manager (brevity called the "A-E-M") to construct for the "A-E-M" a manufacturing plant identified and designated as the Sunflower Ordnance Works, at or near Eudora, but located in Johnson County, Kansas, the following work: The installation of Plumbing, Heating and Ventilation (excepting sheet metal work in connection therewith).

Whereas, the parties hereto have agreed that the subconstructor shall for and in the stead of the Constructor fulfill and perform such part of said subcontract as hereinafter set forth; and

Whereas, the subconstructor has read and is familiar with each and every part of said subcontract, and the respective rights, powers, benefits, obligations and liabilities of the United States of America, hereinafter called the Government, and the Constructor and the A-E-M thereunder.

Now Therefore, This Subcontract Witnesseth: that the parties hereto do mutually agree as follows: [14]

Article I

(a) The work shall be commenced within five (5) calendar days after the date of receipt of notice to proceed, and shall be completed in accordance

Exhibit A—(Continued)

with Paragraph 1-05 of the "General Provisions and Specifications."

(b) The Subconstructor shall be required to do the following work:

The work shall include the furnishing of all plant, equipment, labor and materials (excepting materials to be furnished and/or work to be performed by the Constructor and/or others as specifically provided for in the General Provisions and Specifications) and perform all work necessary for the complete erection of Boilers in Power House Number 1, at the Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with plans and specifications and as directed in writing by the Constructor for and in consideration of the Lump Sum price of Four Hundred Forty Eight Thousand Dollars and No Cents (\$448,000.00); in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows: Specifications entitled "General Provisions and Specifications for Complete Erection of Boilers in Power House No. 1 at Sunflower Ordnance Works, Johnson County, Kansas", Addendum No. 1 thereto, dated 4 July 1944; Addendum No. 2 thereto, dated 5 July 1944; Addendum No. 3, dated 5 July 1944 and plans listed in paragraph 1-03 of those specifications, as amended by the foregoing addenda and in strict accordance with such drawings and written directions in explanation of details and modifications

Exhibit A—(Continued)

which may be prepared by the Constructor prior to and during construction and delivered to the Subconstructor. [15]

Article II.

In the performance of this subcontract, the Subconstructor binds himself to the Constructor and to the A-E-M and to the Government to comply fully with all the undertakings and obligations of the Constructor, excepting such as do not apply to the Subconstructor's work, as are set forth in the construction subcontract with which provisions the Subcontractor is familiar and which is hereby adopted and made a part of this subcontract.

Article IV.

1. Neither this subcontract nor any interest therein shall be assigned or transferred, except as otherwise provided in this Article and except that the whole or any part thereof is assignable to the A-E-M or the Government; and no part of this contract shall be sub-let except (1) under unusual circumstances, (2) upon a fixed-price basis, and (3) with the express written approval of the Contracting Officer and A-E-M.

2. Claims for monies due or to become due to the Subconstructor from the Constructor arising out of this subcontract may be assigned to any bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this subcontract and not already paid, and shall not

Exhibit A—(Continued)

be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; Provided that, in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with:

(a) the Constructor.

(b) The General Accounting Office, [16]

(c) the Contracting Officer who approved this subcontract,

(d) the surety or sureties upon the bond or bonds, if any, in connection with this subcontract, and

(e) The Disbursing Officer designated to make payments under the principal contract.

3. Any claim under this subcontract which may be assigned may be subject to further assignment to a bank, trust company or other financing institution, including any Federal lending agency, and to similar further assignment: Provided that, any such assignee shall file written notice of the further assignment together with a true copy of the instrument of further assignment with the Subconstructor and also as provided in 2 above with respect to original assignment.

4. No assignee shall divulge any information concerning the subcontract or concerning matters contained therein, except to those persons authorized by the Contracting Officer.

Exhibit A—(Continued)**Article X.**

The Subconstructor shall fully cooperate with other subconstructors, subcontractors, or contractors engaged in Government work at the locality covered by the construction subcontract and shall not interfere with the performance of their work. In case of conflict which cannot be adjusted by the Constructor the necessary coordination shall be as directed by the Contracting Officer who executed the construction subcontract, or his duly authorized representative.

Article XI.

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this subcontract, the Subconstructor will immediately give notice thereof to the Constructor.

Article XII.

The Subconstructor, in performing the work required by [17] this subcontract, shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin.

Article XVII.

The following changes were made in this subcontract before it was signed by the parties hereto:

1. The following articles were added:

Exhibit A—(Continued)

“Article XVIII.”

“The subconstructor shall not employ any person undergoing sentence of imprisonment at hard labor.”

“Article XIX.”

“1. Prompt Payment of Wages. The subconstructor, or his subcontractor, shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those determined by the Secretary of Labor for the work herein specified, regardless of any contractual relationship which may be alleged to exist between the subconstructor or his subcontractors and such mechanics and laborers.”

“2. Overtime. The subconstructor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract hereunder that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours in any one calendar day.”

“3. Withholding Accrued Funds. There may be withheld from the subconstructor so much of the

Exhibit A—(Continued)

accrued payments as [18] may be considered necessary by the Constructor to pay to laborers and mechanics employed by the subcontractor or any subcontractor under this subcontract, the difference between the rates of wages required by this subcontract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the subcontractor, his subcontractor, or their agents.”

“4. Right of Termination for Failure to Pay Specified Wages. In the event it is found by the Constructor that any laborer or mechanic employed by the subcontractor or any subcontractor under this subcontract, directly on the site of the work covered by this subcontract has been or is being paid a rate of wages less than the rate of wages required by this subcontract to be paid as aforesaid, the Constructor may, by written notice to the subcontractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the subcontractor and its sureties shall be liable to the Constructor for any excess costs occasioned the Constructor thereby.”

“5. Affidavit Under Kick-Back Act. a. The subcontractor shall furnish to the Constructor within seven (7) days after the regular payment date of each and every weekly payroll, an affidavit in the form prescribed by regulations issued by the Sec-

Exhibit A—(Continued)

retary of Labor and published in the Federal Register of March 1, 1941, 6 F.R. 1211, or any modifications thereof pursuant to the Act of June 13, 1934, 48 Stat. 948 (U. S. Code Title 40, Section 276 b and c) sworn to by the subconstructor or any subcontractor concerned under this subcontract or by the authorized officer or employee of the subconstructor or its subcontractor supervising such payment, [19] to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the payroll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the Subconstructor or its subcontractor from the full weekly wages earned as set out on such payrolls; and that no deductions, other than permissible deductions as defined in said regulations pursuant to said Act of June 13, 1934, and as described in said affidavit have been or will be made, either directly or indirectly, from the full weekly wages earned as set out in such payroll."

"b. The subconstructor shall comply with all applicable requirements of said regulations of the Secretary of Labor under the Act of June 13, 1934, and the requirements of this Article of the subcontract shall be subject to all applicable provisions of such regulations."

2. The following deletions and substitutions were made:

(a) Article III was entirely deleted, and the following Article substituted in lieu thereof:

Exhibit A—(Continued)

“Article III.”

“If the subconstructor refuses or fails to prosecute the work, or any separable part thereof with such diligence as will insure its completion within the time specified in Article I or any extension thereof, or fails to complete said work within such time, the Constructor may, by written notice to the subconstructor, terminate its right to proceed with the work or such part of the work as to which there has been delay. In such event, the Constructor may take over the work, prosecute the same to completion, by contract or otherwise, and the subconstructor and its sureties shall be liable to the Constructor for any excess cost occasioned the Constructor thereby. If the subconstructor’s right to proceed is so terminated, the Constructor may take possession [20] of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor. Provided, that the work of the subconstructor to proceed shall not be terminated under this Article, because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the subconstructor, including, but not restricted to, acts of God, or of the Public enemy, acts of the Constructor, acts of the Government (including, but not restricted to any preference, priority, or allocation order), acts of other contractors or subcontractors in the performance of contracts or subcontracts

Exhibit A—(Continued)

with the Government or the Constructor, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of the subconstructor's subcontractors due to such causes. In which event the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal within 30 days, by the contractor to the Secretary of War or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

(b) Article V was entirely deleted and the following Article substituted in lieu thereof:

“Article V.”

“(a) In consideration of the Subconstructor's undertakings hereunder, the Subconstructor shall receive payment for work performed at the lump sum amount set forth in Article I hereof, which shall constitute full compensation [21] for the performance by the subconstructor of the work and services authorized herein, unless otherwise provided in the specifications.

“(b) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or

Exhibit A—(Continued)

as soon thereafter as practicable, on estimates made and approved by the Constructor. In preparing estimates, the material delivered on the site and preparatory work done may be taken into consideration.

“(c) In making such partial payments, there shall be retained ten per cent (10%) of the estimated amount until final completion and acceptance of all work covered by the subcontract; provided, however, That the Constructor, at any time after fifty per cent (50%) of the work has been completed, if he finds that satisfactory progress is being made may make any of the remaining partial payments in full; and provided, further, that on completion and acceptance of each separate building, vessel, public work, or other division of the Subcontract on which the price is stated separately in the Subcontract, payment may be made in full including retained percentages thereon, less authorized deductions.

“(d). In the event the Contractor exercises any of its reserved rights under the principal contract to which this subcontract is made subject, an equitable adjustment shall be made in the amounts due under this subcontract as of the day of the exercise of such reserved rights, in accordance with Article IX hereof.”

c. Article VI was entirely deleted and the following Article substituted in lieu thereof:

Exhibit A—(Continued)

“Article VI.”

“All disputes concerning questions of fact arising under this subcontract shall be decided by the Contracting Officer, [22] whose decision shall be in writing, subject to appeal by either party hereto within 30 days from the receipt of the Contracting Officer's decision to the Chief of Engineers whose decision shall be final and conclusive upon the parties hereto. Notwithstanding this provision, the subcontractor shall diligently proceed with the work as directed.

(d) Article VII was entirely deleted and the following Article substituted in lieu thereof:

“Article VII.”

“Insurance coverages under this subcontract shall be furnished by the A-E-M in accordance with Paragraph 1-25 of the General Provisions of Specifications.”

(e) Article VIII was entirely deleted, and the following Article substituted in lieu thereof:

“Article VIII.”

“(a) In order to protect the life and health of its employees in the performance of this subcontract, the subcontractor will comply with all pertinent provisions of the “Safety Requirements in Excavation - Building - Construction” approved by Chief of Engineers December 16, 1941, revised March 15, 1943 (a copy of which is on file in the Office of the Contracting Officer), and as may be amended, and will take or cause to be taken such

Exhibit A—(Continued)

additional measures as the Contracting Officer may determine to be reasonably necessary for this purpose. The subcontractor will maintain an accurate record of, and will report to the Contracting Officer, in the manner and on the forms prescribed by the Contracting Officer, all cases of death, occupational disease and traumatic injury arising out of or in the course of employment on work under this subcontract.”

“(b) The Contracting Officer will notify the subcontractor of any noncompliance with the foregoing provisions [23] and the action to be taken. The subcontractor shall, after receipt of such notice, immediately correct the conditions to which attention has been directed. Such notice when served on the subcontractor or his representatives at the site of the work shall be deemed sufficient for the purpose aforesaid.

“(c) If the subcontractor fails or refused to comply promptly, the Contracting Officer may issue an order stopping all or any part of the work. When satisfactory corrective action is taken, a start order will be issued.”

(f) Article IX was entirely deleted and the following Article substituted in lieu thereof:

“Article IX.”

“(a) Subject to the approval of the Contracting Officer, the Constructor may, at any time, by written order, and without notice to the sureties, if any, make changes in the drawings and/or specifica-

Exhibit A—(Continued)

tions of this subcontract and within the general scope thereof. If such changes cause a material increase or material decrease in the amount due under this subcontract, or in the time required for its performance, an equitable adjustment shall be made and the subcontract shall be modified in writing accordingly.

“(b) In the event this subcontract is terminated before the work called for hereunder is completed, the Subconstructor shall be paid at the lump sum amount herein set forth for the actual quantity of work which has been completed as of the date of such termination; provided, however, that should such termination take place before the completion of the minimum quantity of work, as such minimum is defined in the specifications, the subconstructor shall be paid on an equitable basis in accordance with the terms of paragraph (a) of this Article. [24]

“(c) If the subconstructor and the Constructor fail to agree upon an equitable adjustment of the amount of the additions or deductions hereunder, the dispute shall be determined as provided in Article VI.

(g) Article XII was entirely deleted and the following Article substituted in lieu thereof:

“Article XIII.”

The matters set forth in Paragraphs 1-10, 1-05 and 1-07 of the “General Provisions and Specifications” and in Article III of the subcontract, shall

Exhibit A—(Continued)

govern the work under this subcontract with respect to the progress schedule, the progress of the work thereunder, the prosecution of the work, and the right of the Constructor to terminate the Substructor's right to proceed with the work for failure to maintain progress."

(h) Article XIV was entirely deleted and the following Article substituted in lieu thereof:

"Article XIV."

1. Payment Bond—The subconstructor agrees to furnish a payment bond with good and sufficient surety acceptable to the Government for the protection of persons furnishing material or labor in connection with the performance of the work under this agreement on U. S. Standard Form in the penal sum of \$224,000.00.

2. Performance Bond—The subconstructor further agrees to furnish a performance bond with good and sufficient surety or sureties acceptable to the Government in connection with the performance of work under this agreement on U. S. Standard Form in the penal sum of \$44,800.00.

(i) Article XV was entirely deleted and the following Article substituted in lieu thereof: [25]

"Article XV."

"The term 'Chief of Engineers' shall include his duly authorized representative, as the case may be, other than the Contracting Officer.

"The term 'Contracting Officer' refers to the Contracting Officer who approved this subcontract or to his duly appointed successor."

Exhibit A—(Continued)

(j) Article XVI was entirely deleted and the following Article substituted in lieu thereof:

“Article XVI.”

“This subcontract shall be subject to the written approval of the A-E-M and the Contracting Officer, and shall not be binding until so approved.”

(k) The following article was added as Article XX thereof:

“Article XX.”

Renegotiation — (a) This Subcontract shall be deemed to contain all the provisions required by subsection (b) of the Renegotiation Act as amended by Section 701 of the Revenue Act of 1943 (Public Law No. 235, 78th Congress, enacted February 25, 1944).

In Witness Whereof, the parties hereto have executed this subcontract as of the day and year first above written.

CORY-JOSLIN AND
MACNSONS,

By F. V. WEDLECK.

Witnesses, as to Constructor:

KARL V. VASICEK,
J. M. ROBINSON.

POWER SERVICE CORP.,

By D. B. FEGLES,
President.

Approved September 7, 1944.

Exhibit A—(Continued)

Witnesses, as to Subconstructor:

EDNA E. VANSELOW,
P. C. GAFFNEY.

Approved 11 September 1944.

WM. S. LOZIER, INC.—
BRODERICK AND GORDON.By ARTHUR A. DUKELOW,
/s/ JAMES E. MATTHEWS,
Major, Corps of Engineers Resident Engineer and
Contracting Officer. [26]

This contract is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications.

D.B.F.

F.V.W.

A.A.D.

JEM

CERTIFICATE OF CORPORATE
AUTHORITY.

I, Anne Howard certify that I am the acting secretary of the corporation named as the Subconstructor herein; that D. B. Fegles who signed this subcontract on behalf of the Subconstructor was then President of said corporation; that said

Exhibit A—(Continued)

subcontract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Corporate Seal)

ANNE HOWARD,

711 Wesley Temple Bldg., Minneapolis, Minn.

July 11, 1944. [27]

June 20, 1944

Sunflower Ordnance Works

Johnson County, Kansas

General Provisions and Specifications for Complete Erection of Boilers in Power House No. 1 at Sunflower Ordnance Works Johnson County, Kansas.

Section I

General Provisions

1-01. Location. The site of the proposed work is at the Sunflower Ordnance Works, Johnson County, Kansas.

1-02. Work to be done. This work shall include the furnishing of all plant, equipment, labor and materials (excepting materials to be furnished and/or work to be performed by the Constructor and/or other as specifically provided for in the General Provisions and Specifications) and perform all work necessary for the complete Erection of Boilers in Power House Number One at the

Exhibit A—(Continued)

Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with plans and specifications and as directed in writing by the Constructor.

1-03. (a) The work shall conform to drawings designated as follows: * * *

(b) The work shall conform to all drawings relating thereto, as may be furnished by the Constructor prior to the opening of proposals and to such drawings in explanation of details or minor modifications which may be furnished from time to time during construction, including such minor modifications as the Constructor may consider necessary on account of conditions found during prosecution of the work.

(c) Prior to prosecution of the work the Subconstructor shall check all drawings and shall immediately report all [28] errors, discrepancies, and/or omissions discovered therein to the Constructor. Any adjustments made by the Subconstructor without prior approval shall be at his own risk and the settlement of any complications arising from such adjustments shall be made by the Subconstructor at his own expense.

(d) Parts and details required for complete and satisfactory construction and not fully indicated on the drawings furnished by the Constructor will be detailed by the Constructor in accordance with the best modern practice.

(e) These drawings shall be complete, giving all required information. No affected material shall be

Exhibit A—(Continued)

furnished or work done pending approval of these drawings. The subconstructor shall submit three (3) prints of each of such detailed drawings with a carrying letter to the Constructor.

(f) Decisions on these drawings, either approval or disapproval, will be given by letter or telegram within five (5) calendar days after receipt thereof by the Constructor. In the event that action on the drawings is not taken within five (5) calendar days after receipt thereof the Constructor, the time allowed for completion of the subcontract will be increased as provided in subparagraph 1-05 (b). Drawings returned for correction shall be resubmitted for approval as provided above.

(g) After approval, the Subconstructor shall furnish the Constructor with eight (8) prints of each approved drawing. All of these approved drawings will form a part of the subcontract, and will be referred to in the specifications as "approved plans" and/or "approved drawings." * * *

(j) The specifications give, in general, the character of work required, methods of construction and material to be used. In the subcontract, the specifications and plans are to be interpreted as mutually explanatory and supplementary, [29] and therefore, any feature shown on one and not on the other, shall have the same force and effect as if shown on both.

(k) It is the spirit and intent of these specifications and plans to secure for the constructor the

Exhibit A—(Continued)

work described, complete in every respect, and the general conditions thereof shall be complied with, whether items are specifically mentioned or not.

1-04. Quantity. (a) The quantity of work to be performed is the complete erection of boilers in Power House Number One including the furnishing of all plant, equipment, labor and materials (excepting materials to be furnished and/or work to be performed by the Constructor and/or others as specifically provided for in the General Provisions and Specifications) as specified in Paragraph 1-02. The lump sum offer price for the entire work will be the basis of comparison of the offers. Within the limits of the available funds, the Subconstructor will be required to complete the entire work specified in this paragraph, be it more or less than the amount herein specified subject to the provisions of paragraph 1-12 of the specifications.

1-05. Commencement, Prosecution and Completion. (a) The Subconstructor will be required to commence work under the subcontract within five (5) calendar days after the day of receipt by him of Notice to Proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be computed from said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph.

(b) In the event the total payments for work

Exhibit A—(Continued)

actually constructed by the Subconstructor under the subcontract exceed the original amount of the subcontract, the time for [30] completion of the subcontract will be extended in the proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein.

(c) When conditions at the site of the proposed work are considered by the Constructor to be unfavorable to its prosecution, the Constructor may order the Subconstructor in writing to suspend work under the subcontract until the Constructor considers that the unfavorable conditions for the prosecution of the work no longer exist. When the work is so suspended, the time allowed for completion will be increased by an amount equal to the time of suspension as determined by the Constructor.

(d) If the Subconstructor fails to perform the work at a rate satisfactory to the Constructor, as specified in section (a) above by reason of delays in the delivery of materials or supplies essential to such performance, because of war priorities, or, because of conditions existing through no fault or negligence of the Subconstructor, he may be excused for such failure upon the presentation to and the approval by the Constructor of a written state-

Exhibit A—(Continued)

ment setting forth distinctly the causes' for such failure.

(e) In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the Subconstructor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, the Constructor will not be liable for any costs or expenses incurred by the Subconstructor as a result of the increased time for completion of the Subcontract. [31]

(f) Inasmuch as the provisions of the subcontract documents relating to the time for and the rate of performance of the work and the time for completion of the same are inserted for the purpose of enabling the United States Government to proceed with the construction of the Sunflower Ordnance Works in accordance with the predetermined program of War Effort, such provisions are of the essence of the subcontract.

(g) No liquidated damages are provided for under the specifications nor will such damages be provided for in the subcontract.

1-06. If the subconstructor refuses or fails to prosecute the work or any separable part thereof in accordance with the terms and conditions of Paragraph 1-05, the Constructor may by written notice to the Subconstructor terminate his right to proceed with the work or such part of the work involved by such refusal or failure. In such event,

Exhibit A—(Continued)

the Constructor may take over the work and prosecute the same to completion by contract or otherwise, and in so doing, may take over and use for that purpose the Subconstructor's equipment, plant and materials. Any excess cost to the Constructor above the subcontract price for such work or such part of the work, will be charged to the Subconstructor, who will be liable for the same.

1-07. Sundays, Holidays and Nights. Work on Sundays, Holidays and nights will be at the option of the Subconstructor, however, when the Subconstructor elects to work at such times, notice of his intention to do so shall be given to the Constructor within a reasonable time in advance thereof, (subject, however, to the provisions of paragraph 1-10-b).

1-08. Payments. (a) Payments will be made monthly based upon the estimated percentage of completion of the work as determined by the Constructor and not included for payment [32] in any previous estimate covering those portions of the work completed in accordance with the specifications. In making partial payments, ten percent will be retained from each payment until full completion and acceptance of all work covered by the subcontract, provided that the Constructor, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full. The amount so retained, less

Exhibit A—(Continued)

any proper deductions, will be paid to the Subconstructor on completion and final acceptance of all work under the subcontract.

(b) Work not done in order of procedure as instructed by the Constructor will not be included in estimates or payment until it is properly incorporated into the work as a whole.

1-09. Railroad Facilities for hauling freight are available via Atchison, Topeka & Santa Fe Railroad.

1-10. Organization, Plant and Progress. (a) The Subconstructor shall within seven (7) days after receipt of the notice to proceed, prepare and submit to the Constructor for approval a practicable and feasible schedule showing the order in which the Subconstructor proposes to carry on the work, the dates on which he will start the several salient features (including procurement of plant and equipment), and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart of suitable scale so as to indicate appropriately the percentage of work scheduled for completion at any time. The subconstructor shall enter the actual progress at the end of each week, and shall immediately deliver to the Constructor three blue print copies of the same. [33]

(b) The Subconstructor shall furnish sufficient forces, construction plant and equipment, and shall work such hours, including night shifts, overtime operations, and Sunday and holiday work as may

Exhibit A—(Continued)

be necessary to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the Constructor, the Subconstructor falls behind the progress schedule, the Subconstructor shall take such steps as may be necessary to improve his progress and the Constructor may require him to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, all without additional cost to the Constructor.

(c) Failure of the Subconstructor to comply with the requirements of the Constructor under this provision shall be grounds for the determination of the Constructor that the Subconstructor is not prosecuting the work with such diligence as will insure completion within the time specified; and when such determination has been made, the Constructor may terminate the Subconstructor's right to proceed with the work or such part of the work as to which there has been delay, pursuant to Article III of the subcontract.

1-11. Claims, Protests and Appeals. If the Subconstructor considers any work demanded of him to be outside the requirements of the subcontract, or if he considers any action or ruling of the Constructor or of the inspectors to be unfair, the Subconstructor shall without undue delay, upon such demand, action or ruling, submit his protest thereto in writing to the Contracting Officer stating clearly and in detail the basis of his objections.

Exhibit A—(Continued)

The Contracting Officer shall thereupon promptly investigate the complaint and furnish the Subconstructor his decision thereon in writing. If the Subconstructor is not satisfied with the decision of the [34] Contracting Officer, he may, within thirty (30) days, appeal in writing to the Chief of Engineers, whose decision, or that of his duly authorized representative, shall be final and binding upon the parties to the subcontract, Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the Contracting Officer shall be final and conclusive. All appeals from the decisions of the Contracting Officer authorized under the subcontract shall be addressed to the War Department, Chief of Engineers, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the Subconstructor bases his claim for relief and should be presented to the Contracting Officer for transmittal within the time provided therefor in the subcontract.

Provided, however, in case of dispute or disagreement within the meaning of this paragraph, the Subconstructor shall first submit his protest in writing to the Constructor, stating clearly and in detail the basis for his protest. The Constructor will thereupon investigate the complaint and furnish the Subconstructor its written decision thereon. If the Subconstructor is not satisfied with the

Exhibit A—(Continued)

decision of the Constructor he may then proceed as outlined herein.

1-12. Modifications. The right is reserved to make such changes in the execution of the work to be done under these specifications as in the judgment of the Constructor may be necessary or expedient to carry out the intent of the subcontract, provided, that the cost to the Subconstructor of doing the work will not be increased thereby; and no increase in price over the subcontract price will be paid to the Subconstructor of such changes. No change which will materially affect the cost of doing the work will be made, and no [35] greater or less price than the subcontract price will be paid except upon formal written agreement between the parties, as provided in the form of the subcontract to be entered into. (See Article IX of the subcontract).

* * *

1-29. Approval. The subcontract shall be subject to the written approval of the Architect-Engineer-Manager and the Contracting Officer, and shall not be binding until so approved. * * *

Section II—Conduct of Work.

2-01. Order of Work. (a) The work shall be carried on at such locations and in such order or procedure as may be found necessary by the Constructor. The location and limits of the work to be done will be plainly indicated by the Constructor.

(b) The Subconstructor will be required to conduct the work in such manner that other work in

Exhibit A—(Continued)

progress will not be unduly delayed. He shall cooperate and work harmoniously with other contractors at the site to the end that all of the work may be completed as expeditiously as possible.

(c) The location of the work will be indicated by the Constructor. The grades are indicated on the various drawings. The Subconstructor must lay out his work. He shall be responsible for measurements. He must exercise proper precaution to verify the figures on the drawings before laying out the work and will be held responsible for any errors therein that otherwise might have been avoided. He shall promptly inform the Constructor of any errors or discrepancies he may discover in the drawings and specifications in order that the proper corrections may be made and understood. The work must be carried on systematically and so managed at all times as to secure substantial progress and avoid annoyance and inconvenience. All construction operations [36] must be confined to the limits designated by the Constructor.

Section IV—Technical Provisions.

4-01. Intent of Plans and Specifications. The intent is to prescribe a complete work or improvement which the Subconstructor shall do in full compliance with the plans and these specifications. The Subconstructor shall perform the work in accordance with the lines, grades, typical cross-sections, and dimensions shown on the plans or as modified by written order involving changes or im-

Exhibit A—(Continued)

posed as a result of changed conditions; and he shall furnish, unless otherwise provided in the specifications, plans, or in the Subcontract, all materials, implements, machinery, equipment, tools, supplies, and labor necessary for the prosecution of the work.

4-02. Work Covered by Subcontract Prices. (a) The Subconstructor shall, under the subcontract prices, furnish all labor, materials, tools, equipment, plant and supplies (excepting as the same or any part of the same is to be furnished by the Constructor when so specified) and perform all work required by the subcontract to carry out the subcontract in good faith which contemplates everything completed in first class condition, of good material, with accurate workmanship and proper finish in every respect.

(b) In cases where the subcontract price clause in the specifications relating to the unit price for any item requires that the said unit price cover and be considered compensation for certain work or material essential to the item, this same work or material shall not also be measured or paid for under any other pay item which may appear elsewhere in the specifications. * * *

5-04. Materials Furnished by the Constructor.

(a) In general, all materials, equipment and machinery which will [37] actually be incorporated into the permanent construction will be furnished by the Constructor and/or others. Materials and sup-

Exhibit A—(Continued)

plies incidental to the permanent construction, including but not limited to cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment etc., will be supplied by the Subconstructor without cost to the Constructor over and above the subcontract price. Fuel for use in testing operating equipment and for putting the plant in operation will be supplied by the Constructor. Materials furnished by the Constructor will be delivered to the Subconstructor at points and in the manner specified. Section VII hereof.

(b) Immediately after starting work under the Subcontract the Subconstructor shall prepare a "list of materials" including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the Power House in order that shortages may be immediately determined. Such shortages will then be reported to the Constructor for use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the Subconstructor during the progress of the work and the Subconstructor will be held responsible for advising the Constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress.

Exhibit A—(Continued)

(c) Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored and which have been subjected to conditions [38] necessitating reconditioning, refinishing, refacing, cleaning, painting, packing (in valves and pumps), and similar work to properly prepare for installation and operation will be reconditioned, refinished etc., by the Subcontract, except however, that such reconditioning, refinishing etc. shall apply only to defects which have resulted from storage and does not include inherent defects in manufacture or materials. Materials, equipment and machinery which have been broken or otherwise damaged beyond use or repair during storage or which have inherent defects in manufacture or material caused through no fault or negligence of the Subcontractor will be replaced by the Constructor without cost to the Subconstructor.

Section 5-A,

Conservation of Critical Materials.

(Omitted)

[39]

[Title of District Court and Cause.]

ANSWER

Comes now W. E. Joslin, an individual doing business as Cory-Joslin and Macnsons, defendant above-named, and answering the petition of the

above-named plaintiff on file herein, admits, denies and alleges as follows:

That said petition, nor any of its counts, state a cause of action.

In answer to the allegations in Count I:

I.

Defendant admits the allegations contained in paragraphs 1, 3, 4 and 5;

II.

Admits that portion of the allegations contained in paragraph 2 down to the last clause thereof commencing with the words "that a copy * * *" etc., and denies the allegations contained in said last clause;

III.

Denies each and every allegation contained in paragraph 6 and in this regard alleges the fact to be that the [40] Specifications referred to speak for themselves and the words therein "nearly all" mean just what they imply and specifically notified and warned plaintiff to govern itself accordingly;

IV.

Admits all of paragraph 7 except the words "ready and willing", which is denied;

V.

Denies each and every allegation contained in paragraphs 8, 9, 10 and 11, except that defendant admits that he refuses to pay the alleged damages claimed by plaintiff or any part thereof, and in this connection defendant denies that plaintiff has been

damaged in the sum of \$34,343.00 or any other sum or amount and further denies that defendant breached his contract with plaintiff, or is liable to plaintiff in any sum whatsoever in the premises.

In answer to the allegations in Count II.

I.

Defendant by this reference incorporates herein his same admissions, denials and allegations hereinabove set forth in answer to paragraphs 1 to 9 inclusive of Count I of plaintiff's Petition and hereby constitutes them his answer to the same respective paragraphs incorporated by reference in paragraph 1 of Count II, to the same extent as though recited at length herein in answer to said respective paragraphs;

II.

Defendant denies each and every allegation contained in paragraphs 2, 3, 4 and 5 and in this regard alleges the facts to be that the contract and specifications referred to and entered into now express without amendment or modification the true intention and agreement of the parties, that there [41] was no understanding at any time between the parties that plaintiff would be entitled to damages for delayed delivery of materials or that the contract or the specifications provided for any such damages or were intended to so provide, and defendant further alleges the facts to be that the contract referred to was entered into by defendant for the benefit of and at the expense of the United States of America and in keeping with the con-

tracting policy of the United States Government said specifications specifically provided that no liquidated damages should be assessed or payable.

In answer to the allegations in Count III:

I.

Defendant by this reference incorporates herein his same admissions, denials and allegations hereinabove set forth in answer to paragraphs 1 to 9 inclusive of Count I of plaintiff's Petition and hereby constitutes them his answer to the same respective paragraphs incorporated by reference in paragraph 1 of Count III, to the same extent as though reiterated at length herein in answer to said respective paragraphs;

II.

Defendant denies each and every allegation contained in paragraphs 2 and 3 as now alleged or hereafter reformed and further denies that plaintiff has suffered damages in any amount whatsoever or is entitled to recover any sum whatsoever by way of damages or otherwise from defendant in the premises.

That as and for a separate defense to said petition and each of its counts defendant further alleges:

I.

That said plaintiff is barred by:

- (a) estoppel, [42]
- (b) release,
- (c) statute of frauds,
- (d) waiver.

Wherefore defendant prays that he be dismissed with his costs incurred herein.

FRANK J. HENNESSY,
United States Attorney.

/s/ WM. P. CAUBU,
/s/ PAUL B. GIBSON,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 3, 1946. [43]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Now comes defendant and by stipulation of counsel for plaintiff and by leave of Court first had and obtained, files this, his amendment to his Answer heretofore filed.

As and for a separate defense to said petition and each of its counts, defendant further alleges:

I.

That there was no consideration to defendant for

the addenda or additional clause to the signature page of the contract of the parties hereto.

/s/ FRANK J. HENNESSY,
United States Attorney.

PAUL B. GIBSON,
W. P. CAUBU,
Attorneys for Defendant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Mar. 20, 1947. [44]

[Title of District Court and Cause.]

OPINION

March 30, 1948

Lancie L. Watts, 801 Scarritt Building, Kansas City, Missouri, Attorney for the Plaintiff.

Frank J. Hennessy, U. S. District Attorney for the Northern District of California, 422 Post Office Building, San Francisco, Calif.

Rudolph Scholz, Assistant U. S. District Attorney for Northern District of California, 422 Post Office Building, San Francisco, Calif.

Paul B. Gibson, Humboldt Bank Building, San Francisco, Calif., Attorneys for the Defendant.

Clark, District Judge.

This cause involved a claim for damages in the amount of \$34,343.00 for delay in the performance of a construction contract. Plaintiff alleges damages for delay in construction by failure of the defendants to deliver material at the site of the project.

Plaintiff's petition is in three counts.

Count one seeks a declaration of the rights under the contract as written and in alternative, if the construction [45] of the contract be adverse to plaintiff, count two seeks reformation of the contract to make it express the intention of the parties, and count three seeks recovery.

The particular provisions of the contract to be construed which effect the present controversy are as follows:

Article I.

“(a) The work shall be commenced within five (5) calendar days after the date of receipt of notice to proceed, and shall be completed in accordance with paragraph 1-05 of the ‘General Provisions and Specifications.’

“(b) The subconstructor shall be required to do the following work:

“The work shall include the furnishing of all plant, equipment, labor and materials (excepting **materials to be furnished** and/or work to be performed by the constructor and/or others as specifically provided for in the General Provisions and Specifications) and perform all work necessary for the complete erection of Boilers in Power House Number 1, at the Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with plans and specifications and as directed in writing by the Constructor for and in consideration of the Lump Sum price of Four Hundrey Forty Eight Thousand Dollars and no Cents (\$448,000); in strict accordance with the specifications, schedules and

drawings, all of which are made a part hereof and designated as follows: Specifications entitled 'General Provisions and Specifications for Complete Erection of Boilers in Power House No. 1 at Sunflower Ordnance Works, Johnson County, Kansas',
* * * [46]

Materials to be furnished—(specifications)

"5-04 (a) Material furnished by the Constructor. In general, all materials, equipment and machinery which will actually be incorporated into the permanent construction will be furnished by the Constructor and/or others. Material and supplies incidental to the permanent construction, including but not limited to cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment, etc., will be supplied by the Subconstructor without cost to the Constructor over and above the subcontract price. Fuel for use in testing operating equipment and for putting the plant in operation will be supplied by the Constructor. Materials furnished by the Constructor will be delivered to the Subconstructor at points and in the manner specified. Section VII hereof.

"(b) Immediately after starting work under the subcontract the subconstructor shall prepare a 'list of materials' including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the Power House in order that shortages may be immediately determined. Such shortages

will then be reported to the Constructor for use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the Subconstructor during the progress of the work and the Subconstructor will be held responsible for advising the Constructor of his requirements sufficient in advance of the time such items will be required to enable procurement without delaying progress. [47]

“(c) Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored and which have been subjected to conditions necessitating reconditioning, refinishing, refacing, cleaning, painting, packing (in valves and pumps), and similar work to properly prepare for installation and operation will be reconditioned, refinished, etc., by the Subcontractor as a part of this subcontract, except however, that such reconditioning, refinishing, etc., shall apply only to defects which have resulted from storage and does not include inherent defects in manufacture or material. Materials, equipment and machinery which have been broken or otherwise damaged beyond use or repair during storage, or which have inherent defects in manufacture or material caused through no fault or negligence or the subconstructor will be replaced by the Constructor without cost to the Subconstructor.

“Disputes” provisions.

(a) Of the Contract:

Article VI

“All disputes concerning questions of fact arising under this subcontract shall be decided by the Contracting Officer, whose decision shall be in writing, subject to appeal by either party hereto within 30 days from the receipt of the Contracting Officer’s decision to the Chief of Engineers whose decision shall be final and conclusive upon the parties hereto. Notwithstanding this provision, the subcontractor shall diligently proceed with the work as directed.”

(b) Of the Specifications.

“1-11. Claims, Protests and Appeals. If the Subconstructor considers any work demanded of him to be outside the requirements of the subcontract, or if he considers any action or ruling of the Constructor or of the inspectors to be unfair, the Subconstructor shall without undue delay, upon such demand, action or ruling, submit his protest thereto in writing to the contracting officer stating clearly and in detail the basis of his objections. The Contracting Officer shall thereupon promptly investigate the complaint and furnish the Subconstructor his decision thereon in writing. If the Subconstructor is not satisfied with the decision of the Contracting Officer, he may, within thirty (30) days, appeal in writing to the Chief of Engineers, whose decision, or that of his duly authorized representative, shall be final and binding upon the parties to the subcontract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions or decisions of the Contracting

Officer shall be final and conclusive. All appeals from the decisions of the Contracting Officer authorized under the subcontract shall be addressed to the War Department, Chief of Engineers, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the Subconstructor bases his claim for relief and should be presented to the Contracting Officer for transmittal within the time provided therefor in the subcontract.

“Provided, however, in case of dispute or disagreement within the meaning of this paragraph, the Subconstructor [49] shall first submit his protest in writing to the Constructor, stating clearly and in detail the basis of his protest. The Constructor will thereupon investigate the complaint and furnish the Subconstructor its written decision thereon. If the Subconstructor is not satisfied with the decision of the Constructor he may then proceed as outlined herein.”

“Delay” provisions.

(a) General Provisions of the Contract.

Article III

“If the subconstructor refuses or fails to prosecute the work * * * the Constructor may * * * terminate its right to proceed with the work. * * * Provided, that the right of the Subconstructor to proceed shall not be terminated under this Article, because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the subconstructor including, but not restricted to, acts of the Constructor. * * *

(b) General Provisions of the Specifications.

“1-05. Commencement, Prosecution and Completion. (a) The Subconstructor will be required to commence work under the subcontract within five (5) calendar days after the date of the receipt by him of Notice to proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be computed from said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph.

“(b) In the event the total payments for work actually constructed by the Subconstructor under the subcontract exceed the original amount of the subcontract, the time [50] for completion of the subcontract will be extended in proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein.

“(c) When conditions at the site of the proposed work are considered by the Constructor to be unfavorable to its prosecution, the Constructor may order the subconstructor in writing to suspend work under the subcontract until the Constructor considers that the unfavorable conditions for the prosecution of the work no longer exists. When the work is so suspended, the time allowed for completion will be increased by an amount equal to the

time of suspension as determined by the Constructor.

“(d) If the Subconstructor fails to perform the work at a rate satisfactory to the Constructor, as specified in subsection (a) above by reason of delays in the delivery of materials or supplies essential to such performance, because of war priorities, or, because of conditions existing through no fault or negligence of the Subconstructor, he may be excused for such failure upon the presentation to and the approval by the Constructor of a written statement setting forth distinctly the causes of such failure.

“(e) In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the Subconstructor will accept the additional time in which to complete his subcontract in full satisfaction of any [51] delays encountered, and the Constructor will not be liable for any costs or expenses incurred by the Subconstructor as a result of the increased time for completion of the Subcontract.

“(f) Inasmuch as the provisions of the subcontract documents relating to the time for and the rate of performance of the work and the time for completion of the same are inserted for the purpose of enabling the United States Government to proceed with the construction of the Sunflower Ordnance Works in accordance with its predetermined program of War Effort, such provisions are of the essence of the subcontract.

“(g) No liquidated damages are provided for

under the specifications nor will such damages be provided for in the subcontract."

(c) Special provisions of the Contract.

"This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications."

Prior to this contract a general contract was entered into on March 25, 1942, and was designated as "Contract No. W461 eng 10274" between the United States of America and Wm. L. Lozier, Inc., Broderick and Gordon; it was what is known as a "cost plus a fixed fee" contract. It covered the erection of the Sunflower Ordnance works near Kansas City.

On September 1, 1942, a subcontract, known as "F F Construction Subcontract No.....", was entered into between Architect-Engineer-Manager, hereinafter designated as A E M, [52] and W. E. Joslin an individual of the City of San Francisco, California, doing business as Cory-Joslin and Macnsons, for the installation of Plumbing, Heating and Ventilating facilities at the Sunflower Ordnance Works. This contract was also a "cost plus a fixed fee" contract. Later the subcontract in question here was entered into between the plaintiff and the defendant.

Leading up to this Subcontract, invitation to bid was prepared by C. Howard Murphy, Manager of

the Subcontract Department of the A E M. It consisted of a letter, with a copy of the specifications attached.

Bids were opened July 8. Plaintiff's bid was prepared and was submitted on July 8. Plaintiff, the low bidder, at \$448,000. Lump sum was awarded the contract on July 13, this bid covered only the cost of erection. All installation materials and equipment of an approximate value of \$1,145,000 were to be furnished by the defendant, or by those with whom he was contracting, directly or indirectly. Notice to proceed was immediately mailed to and received by plaintiff on July 13.

As soon as the award was made to plaintiff the subcontract department of the A E M through G. Howard Murphy, its Manager, prepared a formal subcontract and mailed it to plaintiff for its signature on July 14. Plaintiff refused to sign the subcontract as prepared because it provided for completion in 120 days without including any provision to compensate the plaintiff for damages if delay in performance should result from the shortages of materials. Several weeks went by during which the parties were negotiating in person and by letter with respect to an increase in cost if performance should be delayed, and with respect to a clause in the contract to protect plaintiff against damages in case of delay. [53]

On August 3, Plaintiff wrote defendant that a predicted delay of six weeks would require an in-

crease in the contract price to cover the following items:

Increase in actual costs	\$34,343.00
S S O A Bldrs Risk Bond.....	1,888.00
Margin 15%	5,151.00

Total price adjustment on account

of delay\$41,382.00

On August 4, this proposal was given to the A E M. On the same date A E M advised defendant that no recommendation could be made for additional compensation at that time.

On August 8, Plaintiff submitted to defendant a letter requesting that there be appended to the signature sheet of the formal contract the following proviso:

“Water wall and roof boiler tubes, which were to have been furnished by the Constructor and available to the subconstructor immediately he was directed to proceed were not and are not as of date of contract so available. This contract is above executed by the subconstructor reserving full rights of recourse to claims for extension of time, and for reimbursement of such increased cost as may be occasioned by non-availability of these above mentioned materials, which were represented in bidding information to be at the site as of date of direction to proceed.”

On August 17, defendant wrote plaintiff that the paragraph suggested in Plaintiff's letter of August 8 was not acceptable.

On August 22, Plaintiff requested the defendant

to state in a letter to plaintiff whether a claim for reimbursement of its increased costs would be valid or invalid under the terms [54] of the contract submitted to plaintiff for signature if there should be proven to be;

1. An increase in the subcontractor's cost because of delay in delivery of materials, if he prosecutes the work without due regard to economy in order to complete as early as possible; or

2. An increase of the period of construction beyond 120 days, for the reason of delayed delivery of materials.

On August 31, defendant declined to write such a letter, but indicated that a contract might be approved with a proper reservation on the signature page. Thereafter, on September 11, 1944, there was added to the signature page of the formal contract, before the contract was executed, a clause which was initialed by all of the parties to the contract as follows:

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05.”

Performance commenced with the preparation of the inventory required under paragraph 5-04(b). This inventory took more than eight weeks to complete.

No verbal representation was made by anyone to

plaintiff in respect to the tubes and headers, as to whether they were or were not in storage. The only representation in this respect is contained in paragraph 5-04(c) of the specifications wherein it is provided:

“Nearly all of the materials required for the work has been stored in Power House No. 1, or in warehouses adjacent thereto.” [55]

By July 26, Plaintiff had progressed to the point in the preparation of the field inventory where it appeared certain that there was a major shortage of materials,—tubes and headers,— that would delay the progress of the work beyond the contract schedule of 120 days. Accordingly on that date plaintiff notified the defendant in writing of the shortages. Defendant immediately referred this letter to the A-E-M which replied in a letter signed by J. S. Hagan Chief Engineer, on July 29, that the shortage would not delay the work.

On August 17, and again on August 19, plaintiff confirmed shortages of tubes and headers. At the same time these shortages were specifically called to the attention of Elmer Bennett, representative of the Combustion Engineering Company who had been sent to the job by his employer to expedite performance.

On August 19, defendant through its representative Ralph Jung suggested that plaintiff go on record with a letter stating certain facts encountered in installing water wall tubes. Such a letter was written on August 29. On August 22, plaintiff

wrote defendant that certain water wall headers had been improperly manufactured and would be unfit for use under the contract.

Neither plaintiff nor defendant had any control over procuring any of the materials that the defendant was required to furnish. The tubes themselves were furnished by the Combustion Engineering Company, although manufactured by a steel or tube mill such, for example, as the Republic Steel Corporation, or the Globe Tube Company, or any one of a dozen similar mills. However, these tubes had been shipped to the Combustion Engineering factory where they were cut to length [56] bent to a definite shape and parts were welded on so as to make a complete unit of a tube to fit in a definite location in the boiler until that was designed especially for the Sunflower Ordnance Project. In fact, the particular water wall tubes which were used at Sunflower were designed, manufactured and furnished by the Combustion Engineering Company under patents which were solely owned by that Company. There was no place else in the United States where these tubes could be obtained other than from the Combustion Engineering Company. It was not possible, therefore, for any of the contracting parties, or others, to go on the open market and purchase the tubes needed. They were manufactured for this particular unit or for units like it only by the Combustion Engineering Company.

The next step was to prepare a schedule of

progress, or construction schedule, for approval by the Contracting Officer of the Government. Plaintiff's original schedule was furnished prior to July 24, but criticisms resulted in a revision on August 17, and it was approved on August 22. This schedule was brought up to date each week. From this Schedule the contracting parties were able to determine the exact date on which essential materials such as tubes and headers were required for the orderly prosecution of the contract. It was approved as reasonable by all of the parties concerned, including the Government and the defendant.

There were three units, identical in Character, upon which identical operations were to be performed. The normal procedure followed by the plaintiff in the erection of such units was to do the work on unit one, then move to number two and repeat and then to unit number three. The construction crew could work more efficiently on the second and third units due to increased familiarity with the exact operations required. [57] The steps in which a contractor must proceed to attain maximum efficiency in the construction of these units are:

Line and place boiler drums in final position.

Install the tubes for the boiler proper and the water tubes.

Install the air heater tubes in a position back of the boiler, in a separate unit, so to speak.

Place a hydrostatic test on the boiler and water tubes.

Install the boiler brick work, insulation and casing.

Erect the pulverized coal burner and duct work.

Install drum internals and boiler appurtenances such as safety valves, steam gauges and water columns; install the instruments and combustion control, the sensitive part of the work, such as small tubes, fittings and miscellaneous apparatus that control the function of the unit; install the recording instruments that record the steam pressure, steam temperature and the flue gas as it leaves the boiler; install the apparatus that controls the supply of coal to the unit, and the supply of air for combustion in proportion to the load or demand on the unit.

The final phase is what plaintiff calls the 'drying out' fire. A slow wood fire is put in the boiler and left for a week to dry out the insulation, the mortar that is in the brick work and in the jacket. At that time the oil and grease that has accumulated in the erection of the work is cleaned out so the boiler is entirely clean before it goes into service. This is followed by a period of adjustment, trial, inspection and operation. This was the sequence in operation.

In estimating for the bid on this job, plaintiff contemplated that the various operations would be done in sequence. This method is recognized by all contractors and by [58] manufacturer's representa-

tives as being normal and orderly. The design of the unit as a whole by the builder is predicated on the assumption that it will be erected in a normal sequence of procedure. Such a method results in labor and time saving.

The only materials that it is claimed delayed the construction program were namely: The water wall tubes and water wall headers.

Plaintiff's proposal and construction schedule, to meet the contract conditions required that these items were to be on the job and available for installation when needed. The installation of the water wall tubes should be done early in the erection program and their installation must be completed before the erector can proceed with the hydrostatic tests, the erection of the boiler brickwork and casing, boiler piping, combustion control and boiler trim.

After being awarded the contract, and while taking inventory of the boiler materials, it was discovered that these shortages existed. No one employed by the defendant was aware of this shortage until after the contract had been awarded, although it was definitely known in the Engineering Department of the A-E-M. In the time allowed for preparation of bid, it would have been impossible for any bidder to have determined by observation prior to the letting, whether or not there was a shortage of this material, because to have done so would have required the moving and handling of several hundred tons of materials and would have

required much more time than was available. The only delay was occasioned by shortages of the water wall tubes and headers.

An inspection was made almost daily by representatives of the A-E-M and the Government. No complaint was made by these inspectors verbally or in writing to any representative of the plaintiff.

Claim for damages. The contract called for completion on November 10, 1944. It was actually completed on December 19, 1944. On February 21, 1945, plaintiff submitted a claim for damages in the amount of \$9,323.02. On June 30, 1945 an amended claim for \$10,008.70 was presented. In each instance the claim enumerated only two items of damages, to-wit:

1. The increased cost of renting equipment.
2. The increased cost of supervisory personnel.

In each instance the claims did not include the following additional elements or items of damage.

1. Cost of 90 days extra time by Borst.
2. Home office overhead for 39 days.
3. Increased cost of labor through delay that is now included in the complaint.

On March 3, 1945 the defendant acknowledged receipt of the claim for \$10,008.70 and made no denial of plaintiff's right to damages in that amount and requested additional date. On July 11, 1945, the defendant denied the claim, not on the ground that plaintiff was not entitled to damages, but on the ground that he was unable to

determine the amount to which plaintiff was entitled. Specifically the defendant's letter reads:

"Please be advised that Cory-Joslin & Macnsons has made a careful study of the facts stated in all of the foregoing letters, as a result of which Cory-Joslin & Macnsons is unable to determine, (1) the actual number of days of delay, if any, chargeable to the alleged delayed delivery of water-wall tubes and proper water-wall headers, (2) the true and correct amount of your claim, and (3) the part of your claim if any, properly chargeable to the alleged delay of delivery of said materials. [60]

"Accordingly, Cory-Joslin & Macnsons is herewith denying your claims and both of them in their entirety."

Plaintiff held the opinion that under the "disputes" provisions of the contract that it would be necessary to submit its claim to and obtain the opinion of the Chief of Engineers at Washington. Accordingly the Government contracting Officer made a detailed examination of the facts. These findings, with plaintiff's claim dated September 29, 1945 were forwarded to the office of the Chief of Engineers, Washington. On March 12, 1946, the Chief of Engineers ruled that he had no authority to pass upon the plaintiff's claim because it was a claim for unliquidated damages resulting from an alleged breach of contract which is recoverable in a judicial proceeding and not through administrative procedure. On June 19, 1946 the present action was instituted.

The questions presented to the Court for decision are:

1. Does the contract between plaintiff and defendant as written provide that defendant shall pay damages caused by the late delivery of material by the defendant.

2. If the contract as written does so provide was the contract breached by the defendant.

3. If the answer is yes to No. 1 and No. 2, was plaintiff damaged and if so, how much.

4. If the Court's construction of the contract as written is against the plaintiff then should the contract be reformed so as to express the intentions of the parties as prayed for in Count II.

5. Was there any consideration for the Special damage clause added to the signature page.

It is not necessary for the Court to comment as to the 4th question as it appears to the Court that the contract as written is a plain and understandable contract, there is [61] a conflict in the contract between the provisions of Par. 1-05 (e) of the specifications and the clause added to the contract prior to signature by the parties.

Paragraph 1-05 (e) of the specifications provides as follows:

“(e) In case time for completion of the work is increased due to any of the causes specified herein it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and the Constructor

will not be liable for any costs or expenses incurred by the subcontractor as a result of the increased time for completion of the subcontract.”

However, none of the parties signed the contract and the plaintiff refused to sign until the following clause was added to it:

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05 of the specifications.”

This clause was added to the contract at the insistence of the plaintiff; it was approved by every one connected with the contract, certainly there could be no binding contract until it was signed and approved. If the bid and acceptance was the complete contract there would have been no necessity for the bond, the written contract and the formalities leading up to its execution. It must be remembered that the bid itself provided that it would not be binding until the contract and bond was executed and approved. [62]

It is not necessary to follow the steps leading up to the signing of the contract as it is plain that the plaintiff insisted from the start that something must be done about the shortage of material either an increase in the contract price or the clause allowing damage for delay.

I will further say that the clause added to the

contract is controlling, it must be said that the provision contained in this clause is in conflict with par. 1-05 (e) of the specifications and although the contract must be construed in its entirety and the clauses construed together, it is plain here that the added clause was intended to supersede the other and should control, for where there is a plain repugnancy between the provisions of a contract as to a provision originally contained in the contract and an added clause, relating to the same provision and inserted in the contract as this clause was, the earlier clause must yield to the latter as far as the conflict exists, particularly is this true when the added clause expresses, as here, the intention of the parties to the contract. It seems to the Court that there is no difficulty here in construing this contract.

It is well settled that where there are inconsistent provisions in a contract one provision being written in, the other being part of the printed form, the written provision (certainly in the absence of any proof to the contrary) will be assumed to express the intent of the parties.

Although this clause was not written but typed as an addition to the contract with the background that lead up to its being typed and added to the contract there is no distinction in the rule as above set forth.

I am of the opinion that this clause added to the contract before execution evidenced the intention of the parties that the plaintiff here was to be paid

any damage it might sustain from failure on the part of the defendant to furnish materials. [63]

Count II will not be considered by the Court and all testimony offered as to County II will not be considered and the objections to its admissibility will be sustained and where motions to strike were made and taken under advisement by the Court, the motions will be granted.

The next question, was there any consideration for the damage clause on the signature page of the contract?

There is no question in the Court's mind that there was sufficient consideration for the added clause. Sec. 1-29 of the specifications upon which the original bid was based specifically provides that there would be no binding contract until it was executed by all the parties and approved by the A-E-M, and the contracting officers. This clause providing for damages was added before any of the parties signed the contract; it was a part of the contract; there is ample consideration for the damage clause.

The next question is: can damages be recovered in excess of the claim originally filed by the plaintiff? Counsel for plaintiff contends it can, basing a part of his contention on the pleadings in this case. The Court feels that its decision should be based on the facts brought out at the trial and will deal with the facts in passing on this question.

The evidence shows that on July 24, 1945, plain-

tiff submitted its claim in the amount of \$10,008.70.

On March 18, 1946 plaintiff was paid \$1,000.00 and receipted in full under its contract. Plaintiff accepted the \$1,000.00 and receipted in the following language: [64]

“March 18, 1946. Power Service Corporation, 711 Wesley Temple Bldg., Minneapolis, Minn.

“Final payment on subcontract F.F. No. 5 to Government Contract No. W-461-Eng-10274 \$1,000.00.

“Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

POWER SERVICE CORP.

(Seal)

P. C. GAFFNEY,
Treasurer.”

It was known to all the parties what that claim was. Plaintiff reserved its right to the claim as submitted and defendant made payment in full, except this claim, to the subcontractor. All parties had knowledge of conditions as they then existed, defendant, it seems, clearly intended to make final payment in full exclusive of the outstanding claim of plaintiff. Plaintiff states that it so received it, there can be no misunderstanding here.

The Court is of the opinion that it was clearly understood that settlement was made in full and there is no basis for any action against defendant

for damages except as was included in the claim reserved.

This case was therefore narrowed down to where it is only a question of determining the amount of damage sustained by the plaintiff through failure to furnish material (limited to the water wall tubes and headers) under the original contract as drawn and as prayed for in Count I. It is also limited to the claim, exhibit 35 filed by the plaintiff.

This makes it unnecessary for the Court to pass on the [65] objections and motions to strike made as to evidence introduced in support of Count II and the evidence introduced as to damage claimed in excess of the claim as filed. It also makes it unnecessary for the Court to pass on the motion for judgment on the pleadings as the foregoing disposes of the question raised and overrules in part and sustains in part the questions raised by the defendant. There were several other minor rulings of the Court to the effect that matters were taken under advisement. These objections and motions are not urged in the briefs filed by either side and are of so little importance that it is not necessary that the Court consider them at this time. As to the final question which is the amount of damages that should be awarded to the plaintiff. This is a more difficult question to determine.

While W. Lyle Borst testified that if the water wall tubes had been delivered on time the contract could have been completed in 120 days, and that the plaintiff was delayed by the failure to deliver

for a period of forty days. As to the claim that the Court is considering here the amount of such loss is listed in exhibit 35 and it is not necessary to list it here. This testimony of Mr. Borst's was based mainly on the production chart exhibit 62 and I think it can be said that in determining the delay this chart is more or less controlling, in fact it must be considered in connection with a great portion of the testimony given in this case.

The failure to deliver the water wall tubes and headers being the only cause of delay for which damages are claimed, it is necessary to determine the extent of the damage occasioned thereby.

First, as to Boiler No. 1. Plaintiff contends that the water wall tubes were required on August 1, 1944 but that they were not received until August 17, 1944, 16 days late, and the evidence supports the fact that the defendant was advised [66] that they would be needed on August 1, the evidence disclosed that the first delay (exhibit 17) was August 16, causing delay of one or two days according to the time of day they were delivered. The production chart shows that this part of the work was 84.5 per cent complete on August 25, and on this percentage it would have taken to August 31 to complete. It was completed on September 8, eight days later than it should have been if the production chart schedule had been maintained. Only two days should be charged to the defendant.

Second, as to Boiler No. 2. Plaintiff contends

that the water wall tubes were required August 8, 1944, but that they were not received until September 20, 1944, 43 days late. On what day delivery was actually made is not clear, however, the production chart shows that plaintiff proposed 42 days for completion, from July 20, to September 3, or 2.38 per cent per day. If they had maintained their schedule they would have completed this segment on October 20. It was practically complete on October 27, seven days late.

Third, as to Boiler No. 3. Plaintiff contends:

Water wall tubes required August 15, 1944

Water wall tubes received September 21, 1944

Water wall tubes 36 days late.

Water wall headers required at start of job, August 15, 1944 latest.

Water wall headers received September 26, 1944

Water wall headers 41 days late.

Boiler tubes on Boiler No. 3 were found to be defective and several days delay was experienced awaiting for new replacement tubes. [67]

If the construction schedule had been maintained it would have been completed on October 14. It was completed October 20, six days late.

The production chart in all, for the water wall tubes and headers for the three boilers, shows twenty-one days delay, and taking the testimony of Mr. Borst for the Plaintiff, and Mr. Joslin for the defendant, both very able engineers and well qualified in this line of work, with the reliance each placed on the production chart, it can be said

that 21 days delay resulted in the completion of this work. However, the testimony of the Plaintiff is that there was no actual delay on Boiler No. 1 until August 15 because of the delayed delivery of water wall tubes and headers, so we cannot consider the chart in fixing the delay on Boiler No. 1. On Boilers No. 2 and No. 3 we take the completion date as shown by the chart in fixing the number of days plaintiff was delayed because of failure to deliver water wall tubes and headers. Instead of 21 days as shown by the construction chart, we have:

2 days on Boiler No. 1 (Testimony of Plaintiff)

7 days on Boiler No. 2

6 days on Boiler No. 3

a total of 15 days delay.

It must also be borne in mind that during the period of time covered by the contract the plaintiff performed three modifications, under their contract, Modification No. 1 for which the plaintiff was paid \$8,382.17; Modification No. 2 for which plaintiff was paid \$4,705.98 and Modification No. 2 for which plaintiff was paid the sum of \$5,732.92.

Also between the time when the material was actually required and the time it was furnished, other phases of the [68] construction work proceeded, with the same labor that would have been used on the boilers, during the period of delay. For example, take the date of September 23, the segment "Low Pressure exhaust and steam" item

was proposed to be 69 per cent complete, and on that date, September 23, was 89 per cent complete. Item Number 4 of the construction schedule, "Treated, softened water, cooling water" was to be 55 per cent complete and that was 63.8 per cent complete. It is not necessary to take up all of these items that were ahead of schedule but it demonstrates that other segments of the work were proceeding ahead of schedule, while this delay existed on the furnishing of water wall tubes and headers.

I have also eliminated the percentage that the plaintiff was behind in the construction prior to the delay in furnishing the water wall tubes and headers, something over four per cent.

The claim as presented by the plaintiff, exhibit No. 35, when broken down into the loss per day, applying the full number of 40 days, is arrived at by division, and the daily loss amounts to \$250.21. The fifteen day delay, at the above rate amounts to \$3,753.15. Plaintiff is entitled to Judgment for this amount together with costs which will include the cost of the preparation of transcript, as stipulated by counsel at the trial.

The Court is of the opinion that interest should be allowed on the amount of \$3,753.15 from March 18, 1946, the date of the final settlement on the contract. However if Counsel have something to present on this question of interest, the Court will hear them by letter in that regard and will make

final determination at the time of signing findings of fact, conclusions of law and judgment. [69]

Counsel for plaintiff will prepare findings, conclusions and judgment in accordance with this opinion. [70]

[Endorsed]: Filed April 1, 1848.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause involved a claim for damages in the amount of \$34,343.00 for delay in the performance of a construction contract. Plaintiff alleges damages for delay in construction by failure of the defendant to deliver material at the site of the project.

Plaintiff's petition is in three counts. Count I seeks a declaration of the rights under the contract as written and in the alternative, if the construction of the contract be adverse to plaintiff, Count II seeks reformation of the contract to make it express the intention of the parties, and Count III seeks recovery.

The cause came on for trial and the Court, having heard the evidence and read the briefs of the respective counsel, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. The Court has jurisdiction of this action

under 28 USCA, Secs. 12, 41(1) and 400. The plaintiff and the defendant are citizens of different states and more than \$3,000 is in controversy in this action.

2. The particular provisions of the contract to be construed which affect the present controversy are as follows: [71]

Article I.

“(a) The work shall be commenced within five (5) calendar days after the date of receipt of notice to proceed, and shall be completed in accordance with paragraph 1-05 of the ‘General Provisions and Specifications.’

“(b) The subcontractor shall be required to do the following work:

“The work shall include the furnishing of all plant, equipment, labor and materials (excepting materials to be furnished and/or work to be performed by the Constructor and/or others as specifically provided for in the General Provisions and Specifications) and perform all work necessary for the complete erection of Boilers in Power House Number 1, at the Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with plans and specifications and as directed in writing by the Constructor for and in consideration of the Lump Sum price of Four Hundred Forty Eight Thousand Dollars and no Cents (\$448,000.00); in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof **and designated as follows: Specifications entitled**

‘General Provisions and Specifications for complete erection of boilers in Power House No. 1 at Sunflower Ordnance Works, Johnson County, Kansas’,
* * *’

Materials to be furnished—(specifications)

“5-04 (a) Materials furnished by the Constructor. In general, all materials, equipment and machinery which will actually be incorporated into the permanent construction will be furnished by the Constructor and/or others. Materials and supplies incidental to the permanent construction, including but not limited to cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment, etc. will be supplied by the Subconstructor without cost to the Constructor over and above the subcontract price. Fuel for use in testing operating equipment and for putting the plant in operation will be supplied by the Constructor. Materials furnished by the Constructor will be delivered to the Subconstructor at points and in the manner specified. Section VII hereof.

“(b) Immediately after starting work under the subcontract the subconstructor shall prepare a ‘list of materials’ including accessories and equipment required, and shall check this list against the materials, accessories and [72] equipment stored in or adjacent to the Power House in order that shortages may be immediately determined. Such shortages will then be reported to the Constructor for

use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the Subconstructor during the progress of the work and the Subconstructor will be held responsible for advising the Constructor of his requirements sufficient in advance of the time such items will be required to enable procurement without delaying progress.

“(c) Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored and which have been subjected to conditions necessitating reconditioning, refinishing, refacing, cleaning, painting packing (in valves and pumps), and similar work to properly prepare for installation and operation will be reconditioned, refinished etc., by the Subcontractor as a part of this subcontract, except however, that such reconditioning, refinishing etc., shall apply only to defects which have resulted from storage and does not include inherent defects in manufacture or material. Materials, equipment and machinery which have been broken or otherwise damaged beyond use or repair during storage, or which have inherent defects in manufacture or material caused through no fault or negligence of the subconstructor will be replaced by the Constructor without cost to the Subconstructor.”

“Disputes” provisions.

(a) Of the Contract:

Article VI.

“All disputes concerning questions of fact arising under this subcontract shall be decided by the Contracting Officer, whose decision shall be in writing, subject to appeal by either party hereto within 30 days from the receipt of the Contracting Officer’s decision to the Chief of Engineers whose decision shall be final and conclusive upon the parties hereto. Notwithstanding this provision, the subcontractor shall diligently proceed with the work as directed.”

(b) Of the Specifications.

“1-11. Claims, Protests and Appeals. If the Subconstructor considers any work demanded of him to be outside the requirements of the subcontract, or if he considers any action or ruling of the Constructor or of the inspectors [73] to be unfair, the Subconstructor shall without undue delay, upon such demand, action or ruling, submit his protest thereto in writing to the Contracting Officer stating clearly and in detail the basis of his objections. The Contracting Officer shall thereupon promptly investigate the complaint and furnish the Subconstructor his decision thereon in writing. If the Subconstructor is not satisfied with the decision of the Contracting Officer, he may, within thirty (30) days, appeal in writing to the Chief of Engineers, whose decision, or that of his duly authorized representative, shall be final and binding upon the parties to the subcontract. Except for such protests or objections as are made of record in the manner

herein specified and within the time limit stated, the records, rulings, instructions or decisions of the Contracting Officer shall be final and conclusive. All appeals from the decisions of the Contracting Officer authorized under the subcontract shall be addressed to the War Department, Chief of Engineers, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the Subconstructor bases his claim for relief and should be presented to the Contracting Officer for transmittal within the time provided therefor in the subcontract.

“Provided, however, in case of dispute or disagreement within the meaning of this paragraph, the Subconstructor shall first submit his protest in writing to the Constructor, stating clearly and in detail the basis of his protest. The Constructor will thereupon investigate the complaint and furnish the Subconstructor its written decision thereon. If the Subconstructor is not satisfied with the decision of the Constructor he may then proceed as outlined herein.”

“Delay” provisions.

(a) General Provisions of the Contract.

Article III.

“If the subconstructor refuses or fails to prosecute the work * * * the Constructor may * * * terminate its right to proceed with the work * * * Provided, that the right of the Subconstructor to proceed shall not be terminated under this Article, because of any delays in the completion of the

work due to causes beyond the control and without the fault or negligence of the subconstructor including, but not restricted to, acts of the Constructor.

* * * *

(b) General Provisions of the Specifications.

“1-05. Commencement, Prosecution and Completion. (a) The Subconstructor will be required to commence work under the subcontract within five (5) calendar days after the date of the receipt by him of Notice to proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be computed from said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph.

“(b) In the event the total payments for work actually constructed by the Subconstructor under the subcontract exceed the original amount of the subcontract, the time for completion of the subcontract will be extended in proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein.

“(c) When conditions at the site of the proposed work are considered by the Constructor to be unfavorable to its prosecution, the Constructor may order the subconstructor in writing to suspend work

under the subcontract until the Constructor considers that the unfavorable conditions for the prosecution of the work no longer exists. When the work is so suspended, the time allowed for the completion will be increased by an amount equal to the time of suspension as determined by the Constructor.

“(d) If the Subconstructor fails to perform the work at a rate satisfactory to the Constructor, as specified in subsection (a) above by reason of delays in the delivery of materials or supplies essential to such performance, because of war priorities, or, because of conditions existing through no fault or negligence of the Subconstructor, he may be excused for such failure upon the presentation to and the approval by the Constructor of a written statement setting forth distinctly the causes of such failure.

“(e) In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the Subconstructor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and the Constructor will not be liable for any costs or expenses incurred by the Subconstructor as a result of the increased time for completion of the Subcontract. [75]

“(f) Inasmuch as the provisions of the subcontract documents relating to the time for and the rate of performance of the work and the time for completion of the same are inserted for the purpose of enabling the United States Government to pro-

ceed with the construction of the Sunflower Ordnance Works in accordance with its predetermined program of War Effort, such provisions are of the essence of the subcontract.

“(g) No liquidated damages are provided for under the specifications nor will such damages be provided for in the subcontract.”

(c) Special provisions of the Contract.

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications.”

3. Prior to this contract a general contract was entered into on March 25, 1942, and was designated as “Contract No. W461-eng-10274,” between the United States of America and Wm. L. Lozier, Inc., Broderick and Gordon; it was what is known as a “cost-plus-a-fixed-fee” contract. It covered the erection of the Sunflower Ordnance Works near Kansas City.

4. On September 1, 1942, a subcontract, known as “F F Construction Subcontract No. 5,” was entered into between Architect-Engineer-Manager, hereinafter designated as A-E-M, and W. E. Joslin, an individual of the City of San Francisco, California, doing business as Cory-Joslin and Macnsons, for the installation of the plumbing, heating and ventilating facilities at the Sunflower Ordnance

Works. This contract was also a "cost-plus-a-fixed-fee" contract. Later the subcontract in question here was entered into between the plaintiff and the defendant.

5. Leading up to this Subcontract, an invitation to bid was prepared by C. Howard Murphy, Manager of the Subcontract Department [76] of the A-E-M. It consisted of a letter, with a copy of the specifications attached.

6. Bids were opened July 8. Plaintiff's bid was prepared and was submitted on July 8. Plaintiff, the low bidder, at a \$448,000 lump sum bid, was awarded the contract on July 13. This bid covered only the cost of erection. All installation materials and equipment, of an approximate value of \$1,145,000, were to be furnished by the defendant, or by those with whom he was contracting, directly or indirectly. Notice to proceed was immediately mailed to and received by plaintiff on July 13.

7. As soon as the award was made to plaintiff the subcontract department of the A-E-M, through C. Howard Murphy, its manager, prepared a formal subcontract and mailed it to plaintiff for its signature on July 14. Plaintiff refused to sign the subcontract as prepared because it provided for completion in 120 days without including any provisions to compensate the plaintiff for damages if delay in performance should result from the shortages of materials. Several weeks went by during which the parties were negotiating in person and by letter with respect to an increase in cost if

performance should be delayed, and with respect to a clause in the contract to protect plaintiff against damages in case of delay.

8. On August 3, plaintiff wrote defendant that a predicted delay of six weeks would require an increase in the contract price to cover the following items:

Increase in actual costs.....	\$34,343.00
SSOA Bldrs. Risk Bond.....	1,888.00
Margin 15%	5,151.00

Total price adjustment on account

of delay \$41,382.00

9. On August 4, this proposal was given to the A-E-M. On the same date A-E-M advised defendant that no recommendation could be made for additional compensation at that time.

10. On August 8, plaintiff submitted to defendant a letter requesting that there be appended to the signature sheet of the formal contract the following proviso:

“Water wall and roof boiler tubes, which were to have been furnished by the Constructor and available to the subconstructor immediately he was directed to proceed were not and are not as of date of contract so available. This contract is above executed by the Subconstructor reserving full rights of recourse to claims for extension of time, and for reimbursement of such increased cost as may be occasioned by non-availability of these above mentioned materials, which were represented in bidding

information to be at the site as of date of direction to proceed."

11. On August 17, defendant wrote plaintiff that the paragraph suggested in Plaintiff's letter of August 8 was not acceptable.

12. On August 22, plaintiff requested the defendant to state in a letter to plaintiff whether a claim for reimbursement of its increased costs would be valid or invalid under the terms of the contract submitted to plaintiff for signature if there should be proven to be:

(a) An increase in the subcontractor's cost because of delay in delivery of materials, if he prosecutes the work without due regard to economy in order to complete as early^o as possible; or

(b) An increase of the period of construction beyond 120 days, for the reason of delayed delivery of materials.

13. On August 31, defendant declined to write such a letter, but indicated that a contract might be approved with a proper reservation on the signature page. Thereafter, on September 11, 1944, there was added to the signature page of the formal contract, [78] before the contract was executed, a clause which was initialed by all of the parties to the contract as follows:

"This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of

materials notwithstanding the provisions of paragraph 1-05."

Performance commenced with the preparation of the inventory required under paragraph 5-04(b). This inventory took more than eight weeks to complete.

14. No verbal representation was made by anyone to plaintiff in respect to the tubes and headers, as to whether they were or were not in storage. The only representation in this respect is contained in paragraph 5-04(c) of the specifications wherein it is provided:

"Nearly all of the materials required for the work has been stored in Power House No. 1, or in warehouses adjacent thereto."

15. By July 26, plaintiff had progressed to the point in the preparation of the field inventory where it appeared certain that there was a major shortage of materials,—tubes and headers,—that would delay the progress of the work beyond the contract schedule of 120 days. Accordingly on that date plaintiff notified the defendant in writing of the shortages. Defendant immediately referred this letter to the A-E-M which replied in a letter signed by J. S. Hagan, Chief Engineer, on July 29, that the shortage would not delay the work.

16. On August 17, and again on August 19, plaintiff confirmed shortages of tubes and headers. At the same time these shortages were specifically called to the attention of Elmer Bennett, representative of the Combustion Engineering Company

who had been sent to the job by his employer to expedite performance. [79]

17. On August 19, defendant, through its representative Ralph Jung, suggested that plaintiff go on record with a letter stating certain facts encountered in installing water wall tubes. Such a letter was written on August 29. On August 22, plaintiff wrote defendant that certain water wall headers had been improperly manufactured and would be unfit for use under the contract.

18. Neither plaintiff nor defendant had any control over procuring any of the materials that the defendant was required to furnish. The tubes themselves were furnished by the Combustion Engineering Company, although manufactured by a steel or tube mill such, for example, as the Republic Steel Corporation, or the Globe Tube Company, or any one of a dozen similar mills. However, these tubes had been shipped to the Combustion Engineering factory where they were cut to length, bent to a definite shape and parts were welded on so as to make a complete unit of a tube to fit in a definite location in the boiler unit that was designed especially for the Sunflower Ordnance Project. In fact, the particular water wall tubes which were used at Sunflower were designed, manufactured and furnished by the Combustion Engineering Company under patents which were solely owned by that Company. There was no place else in the United States where these tubes could be obtained other than from the Combustion Engineering Company.

It was not possible, therefore, for any of the contracting parties, or others, to go on the open market and purchase the tubes needed. They were manufactured for this particular unit or for units like it only by the Combustion Engineering Company.

19. The next step was to prepare a Schedule of progress, or construction schedule, for approval by the Contracting Officer of the Government. Plaintiff's original schedule was furnished prior to July 24, but criticisms resulted in a revision on [80] August 17, and it was approved on August 22. This schedule was brought up to date each week. From this schedule the contracting parties were able to determine the exact date on which essential materials such as tubes and headers were required for the orderly prosecution of the contract. It was approved as reasonable by all of the parties concerned, including the Government and the defendant.

20. There were three units, identical in character, upon which identical operations were to be performed. The normal procedure followed by the plaintiff in the erection of such units was to do the work on unit one, then move to number two and repeat and then to unit number three. The construction crew could work more efficiently on the second and third units due to increased familiarity with the exact operations required. The steps in which a contractor must proceed to attain maximum efficiency in the construction of these units are:

(a) Line and place boiler drums in final position.

(b) Install the tubes for the boiler proper and the water tubes.

(c) Install the air heater tubes in a position back of the boiler, in a separate unit, so to speak.

(d) Place a hydrostatic test on the boiler and water tubes.

(e) Install the boiler brick work, insulation and casing.

(f) Erect the pulverized coal burner and duct work.

(g) Install drum internals and boiler appurtenances such as safety valves, steam gauges and water columns; install the instruments and combustion control, the sensitive part of the work, such as small tubes, fittings and miscellaneous apparatus that control the function of the unit; install the recording instruments that record the steam pressure, steam temperature and the flue gas as it leaves the boiler; install the apparatus that controls the supply of coal to the unit, and the supply of air for combustion in proportion to the load or demand on the unit.

(h) The final phase is what plaintiff calls the "drying out" fire. A slow wood fire is put in the boiler and left for a week to dry out the insulation, the mortar that is in the brick work and in the jacket. At that time the oil and grease that has accumulated in the erection of the work is cleaned out so the boiler is entirely clean before it goes into service. This is followed by a period of adjustment, trial, inspection and operation. This was the sequence in operation.

21. In estimating for the bid on this job, plaintiff contemplated that the various operations would be done in sequence. This method is recognized by all contractors and by manufacturer's representatives as being normal and orderly. The design of the unit as a whole by the builder is predicated on the assumption that it will be erected in a normal sequence of procedure. Such a method results in labor saving and time saving.

22. The only materials that it is claimed delayed the construction program were namely: The water wall tubes and water wall headers. Plaintiff's proposal and construction schedule, to meet the contract conditions required that these items were to be on the job and available for installation when needed. The installation of the water wall tubes should be done early in the erection program and their installation must be completed before the erector can proceed with the hydrostatic tests, the erection of the boiler brickwork and casing, boiler piping, combustion control and boiler trim.

23. After being awarded the contract, and while taking inventory of the boiler materials, it was discovered that these [82] shortages existed. No one employed by the defendant was aware of this shortage until after the contract had been awarded, although it was definitely known in the Engineering Department of the A-E-M. In the time allowed for the preparation of bid, it would have been impossible for any bidder to have determined by observation prior to the letting, whether or not

there was a shortage of this material, because to have done so would have required the moving and handling of several hundred tons of materials and would have required much more time than was available. The only delay was occasioned by shortages of the water wall tubes and headers.

24. An inspection was made almost daily by representatives of the A-E-M and the Government. No complaint was made by these inspectors verbally or in writing to any representative of the plaintiff.

25. Claim for damages. The contract called for completion on November 10, 1944. It was actually completed on December 19, 1944. On February 21, 1945, plaintiff submitted a claim for damages in the amount of \$9,323.02. On June 30, 1945 an amended claim for \$10,008.70 was presented. In each instance the claim enumerated only two items of damages, to-wit:

(a) The increased cost of renting equipment.

(b) The increased cost of supervisory personnel.

In each instance the claim did not include the following additional elements or items of damage that are now included in the complaint, to-wit:

(a) Cost of 90 days extra time by Borst.

(b) Home office overhead for 39 days.

(c) Increased cost of labor, caused by delay in the delivery of materials. [83]

26. On March 3, 1945, the defendant acknowledged receipt of the claim for \$10,008.70 and made no denial of plaintiff's right to damages in that amount and requested additional data. On July 11.

1945, the defendant denied the claim, not on the ground that plaintiff was not entitled to damages, but on the ground that he was unable to determine the amount to which plaintiff was entitled. Specifically the defendant's letter reads:

“* * * * * Please be advised that Cory-Joslin & Macnsons has made a careful study of the facts stated in all of the foregoing letters, as a result of which Cory-Joslin & Macnsons is unable to determine, first, the actual number of days of delay, if any, chargeable to the alleged delayed delivery of water-wall tubes and proper water-wall headers; second, the true and correct amount of your claim; and third, the part of your claim, if any, properly chargeable to the alleged delay of delivery of said materials.

“Accordingly, Cory-Joslin & Macnsons is herewith denying your claims and both of them in their entirety.”

27. Plaintiff held the opinion, under the “disputes” provision of the contract, that it would be necessary to submit its claim to and obtain the opinion of the Chief of Engineers at Washington. Accordingly, the Government Contracting Officer made a detailed examination of the facts. These findings, with plaintiff's claim dated September 29, 1945, were forwarded to the office of the Chief of Engineers, Washington. On March 12, 1946, the Chief of Engineers ruled that he had no authority to pass upon the plaintiff's claim because it was a claim for unliquidated damages resulting from an

alleged breach of contract which is recoverable in a judicial proceeding and not through administrative procedure.

28. On March 18, 1946 plaintiff was paid \$1,000.00 and receipted in full under its contract. Plaintiff accepted the \$1,000.00 and receipted in the following language: [84]

“March 18, 1946. Power Service Corporation, 711 Wesley Temple Bldg., Minneapolis, Minn.

“Final payment on subcontract F.F. No. 5 to Government Contract No. W-461-Eng-10274 \$1,000.00.

“Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

POWER SERVICE CORP.,

(Seal)

P. C. GAFFNEY,
Treasurer.

It was known to all the parties what that claim was. Plaintiff reserved its right to the claim as submitted and defendant made payment in full, except this claim, to the subcontractor. All parties had knowledge of conditions as they then existed. Defendant, it seems, clearly intended to make final payment in full exclusive of the outstanding claim of plaintiff. Plaintiff states that it so received it. There can be no misunderstanding here.

29. On June 19, 1946, the present action was instituted. The questions presented to the Court for decision are:

(a) Does the contract between plaintiff and defendant as written provide that defendant shall pay damages caused by the late delivery of material by the defendant.

(b) If the contract as written does so provide was the contract breached by the defendant.

(c) If the answer is yes to (a) and (b), was plaintiff damaged, and if so, how much.

(d) If the Court's construction of the contract as written is against the plaintiff then should the contract be reformed so as to express the intentions of the parties as prayed for in Count II. [85]

(e) Was there any consideration for the Special damage clause added to the signature page.

It is not necessary for the Court to comment on the question in paragraph (d), *supra*, as it appears to the Court that the contract as written is a plain and understanding contract. There is a conflict in the contract between the provisions of Par. 1-05(e) of the specifications and the clause added to the contract prior to signature by the parties.

Paragraph 1-05(e) of the specifications provides as follows:

“(e) In case time for completion of the work is increased due to any of the causes specified herein it is distinctly understood and agreed that the sub-constructor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and the Constructor will not be liable for any costs or expenses incurred by

the subconstructor as a result of the increased time for completion of the subcontract."

However, none of the parties signed the contract and the plaintiff refused to sign until there was added to it the following clause:

"This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05 of the specifications."

This clause was added to the contract at the insistence of the plaintiff; it was approved by every one connected with the contract. Certainly there could be no binding contract until it was signed and approved. If the bid and acceptance was the complete contract there would have been no necessity for the bond, the written contract and the formalities leading up to its execution. The bid itself provided that it would not be binding until the contract and bond was executed and approved.

Count II will not be considered by the Court and all [86] testimony offered as to Count II will not be considered and the objections to its admissibility will be sustained and where motions to strike were made and taken under advisement by the Court, the motions will be granted.

30. This case has, therefore, narrowed down to where it is only a question of determining the amount of damage sustained by the plaintiff through failure to furnish material (limited to the water

wall tubes and headers) under the original contract as drawn and as prayed for in Count I. It is also limited to the claim, Exhibit 35, filed by the plaintiff. The failure to deliver the water wall tubes and headers being the only cause of delay for which damages are claimed, it is necessary to determine the extent of the damage occasioned thereby. This is a more difficult question to determine.

31. W. Lyle Borst testified that if the water wall tubes had been delivered on time the contract could have been completed in 120 days, and that the plaintiff was delayed by the failure to deliver for a period of forty days. As to the claim that the Court is considering here the amount of such loss is listed in Exhibit 35 and it is not necessary to list it here. This testimony of Mr. Borst's was based mainly on the production chart, Exhibit 62, and I think it can be said that in determining the delay this chart is more or less controlling. In fact, it must be considered in connection with a great portion of the testimony given in this case.

32. First, as to Boiler No. 1. Plaintiff contends that the water wall tubes were required on August 1, 1944, but that they were not received until August 17, 1944, 16 days late, and the evidence supports the fact that the defendant was advised that they would be needed on August 1. However, the evidence disclosed [87] that the first delay (Exhibit 17) was August 16, causing a delay of one or two days according to the time of day they were delivered. The production chart shows that this part of the work was 84.5 per cent complete on August

25, and on this percentage it would have taken to August 31 to complete. It was completed on September 8, eight days later than it should have been if the production chart schedule had been maintained. Only two days should be charged to the defendant.

33. Second, as to Boiler No. 2. Plaintiff contends that the water wall tubes were required August 8, 1944, but that they were not received until September 20, 1944, 43 days late. On what day delivery was actually made is not clear, however, the production chart shows that plaintiff proposed 42 days for completion, from July 20 to September 3, or 2.38 per cent per day. If they had maintained their schedule they would have completed this segment on October 20. It was practically complete on October 27, seven days late.

34. Third, as to Boiler No. 3. Plaintiff contends:
Water wall tubes required August 15, 1944.

Water wall tubes received September 21, 1944.

Water wall tubes 36 days late.

Water wall headers required at start of job, August 15, 1944 latest.

Water wall headers received September 26, 1944.

Water wall headers 41 days late.

Boiler tubes on Boiler No. 3 were found to be defective and several days delay was experienced awaiting for new replacement tubes.

If the construction schedule had been maintained it would have been completed on October 14. It was completed October 20, six days late.

35. The production chart in all, for the water

wall tubes and headers for the three boilers, shows twenty-one days delay. [88] Taking the testimony of Mr. Borst for the plaintiff, and Mr. Joslin for the defendant, both very able engineers and well qualified in this line of work, with the reliance each placed on the production chart, it can be said that 21 days delay resulted in the completion of this work. However, the testimony of the plaintiff is that there was no actual delay on Boiler No. 1 until August 15, because of the delayed delivery of water wall tubes and headers, so we cannot consider the chart in fixing the delay on Boiler No. 1. On Boilers No. 2 and No. 3 we take the completion date as shown by the chart in fixing the number of days plaintiff was delayed because of failure to deliver water wall tubes and headers. Instead of 21 days as shown by the construction chart, we have:

2 days on Boiler No. 1. (Testimony of plaintiff)

7 days on Boiler No. 2.

6 days on Boiler No. 3.

a total of 15 days delay.

36. During the period of time covered by the contract the plaintiff performed three modifications, under their contract, Modification No. 1 for which the plaintiff was paid \$8,382.17; Modification No. 2 for which plaintiff was paid \$4,705.98, and Modification No. 3 for which plaintiff was paid the sum of \$5,732.92.

37. Between the time when the material was actually required and the time it was furnished, other phases of the construction work proceeded, with the same labor that would have been used on the boilers,

during the period of delay. For example, take the date of September 23, the segment "Low Pressure exhaust and steam" item was proposed to be 69 per cent complete, and on that date, September 23, it was 89 per cent complete. [89] Item Number 4 of the construction schedule, "Treated, softened water, cooling water" was to be 55 per cent complete and that was 63.8 per cent complete. It is not necessary to take up all of these items that were ahead of schedule but it demonstrates that other segments of the work were proceeding ahead of schedule, while this delay existed in the furnishing of water wall tubes and headers.

38. I have also eliminated the percentage that the plaintiff was behind in the construction prior to the delay in furnishing the water wall tubes and headers, something over four per cent.

39. The claim as presented by the plaintiff, Exhibit 35, when broken down into the loss per day, applying the full number of 40 days, is arrived at by division, and the daily loss amounts to \$250.21. The fifteen-day delay, at the above rate, amounts to \$3,753.15. Plaintiff is entitled to Judgment for this amount together with costs which will include the cost of the preparation of transcript, as stipulated by counsel at the trial.

CONCLUSIONS OF LAW

The Court declares the law to be:

1. There was no binding contract between the parties until it was signed and approved by the

parties with the "special damage clause" on the signature page.

2. While there is a conflict in the contract between the provisions of paragraph 1.05(e) in the printed form of the Specifications and the "special damage clause" typed on the signature page prior to signature by the parties, the typewritten provision is assumed, in the absence of any proof to the contrary, to express the intention of the parties and must prevail herein.

3. The contract between plaintiff and defendant, as [90] written, evidenced the intention of the parties and provides that defendant shall pay damages caused by the late delivery of materials to the plaintiff.

4. There was a valid consideration for the special damage clause on the signature page of the contract.

5. The contract was breached by the defendant because of his delays in the delivery of water wall tubes and headers.

6. Plaintiff cannot recover damages in excess of \$10,008.70, this being the amount specified in its original claim dated June 30, 1945 (plaintiff's Exhibit 35).

7. Plaintiff cannot recover on any element of damages not included in its claim of June 30, 1945.

8. Plaintiff is not entitled to recover under Counts II and III.

9. Plaintiff is entitled to recover, under Count I of its petition, damages in the sum of \$3,753.15, with interest thereon at the rate of 6% per annum

from March 18, 1946, and for its costs herein incurred, including the cost of preparing the transcript, to-wit, \$808.30, as stipulated by counsel at the trial.

Dated at San Francisco this 30th day of April, 1948.

CHASE A. CLARK,
United States District Judge.

[Endorsed]: Lodged 4-20-48. Filed May 7, 1948.

In the District Court of the United States for
the Northern District of California, Southern
Division.

No. 26113-R

POWER SERVICE CORPORATION,
a corporation,

Plaintiff,

vs.

W. E. JOSLIN, doing business as
CORY-JOSLIN AND MACNSONS,

Defendant.

DECREE

Now on this 7th day of May, 1948, this cause having been submitted to the Court upon the pleadings, the evidence adduced by the parties and the briefs of counsel, and the Court being fully advised in the premises, and having made formal Findings of

Fact and states its Conclusions of Law in writing and filed the same,

It is hereby ordered, adjudged and decreed:

1. That, under Count I of Plaintiff's petition, plaintiff have and recover of and from the defendant the principal sum of Three Thousand Seven Hundred Fifty Three & 15/100 (\$3,753.15) Dollars, together with interest thereon at the rate of 6% per annum from date hereof until paid.

2. That Counts II and III of plaintiff's petition be and the same are hereby dismissed.

3. That the costs of this suit, including the cost of preparing a transcript in the amount of \$808.30 be taxed by the Clerk against the defendant, for all of which let execution issue.

4. That the total costs taxed by the Clerk are \$607.82.

Dated May 7, 1948.

CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed May 7, 1948. [92]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Power Service Corporation, a corporation, plaintiff in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from that part of the final decree and judgment dated and entered in this action on May 7, 1948, designated as paragraph "1," which awards plain-

tiff damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3753.15) instead of the amount of damages established by the evidence in this cause, to-wit, Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88).

/s/ LANCIE L. WATTS.

[Endorsed]: Filed May 27, 1948. [93]

[Title of Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are that the Trial Court erred:

1. In awarding plaintiff damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3753.15) instead of in the amount of damages established by the evidence, to-wit, the sum of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88).

2. In its Findings of Fact No. 32 holding that appellant was delayed only two days on Boiler No. 1, instead of sixteen days as shown by the evidence.

3. In its Findings of Fact No. 33, holding that appellant was delayed only seven days on Boiler No. 2, instead of thirty-seven days as shown by the evidence.

4. In its Findings of Fact No. 34, holding that appellant was delayed only six days on Boiler No. 3 instead of forty-four days as shown by the evidence.

5. In its Findings of Fact No. 35, holding that appellant was delayed a total of only fifteen days in completing its contract, and in the court's failure to find from the evidence that the appellant was delayed from November 10, 1944, to December 19, 1944, a total of thirty-nine days.

6. In its Findings of Fact No. 39, in which the court arbitrarily determined that the loss to appellant amounted to Two Hundred Fifty & 21/100 Dollars (\$250.21) daily, and in its failure to find from the evidence that the total damages amounted to Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88) made up of the following distinct and clearly established items of damage, to-wit:

Item 1: Extra cost of equipment rental.	\$ 2,255.50
Item 2: Extra cost of supervisory personnel (except Borst)	8,267.53
Item 3: Extra cost of 90 days additional time and expense Borst.....	2,542.31
Item 4: Home Office overhead.....	6,649.82
Item 5: Loss in Efficiency.....	14,611.72
	<hr/>
	\$34,326.88

7. In its Conclusion of Law No. 5, insofar as the Court held that plaintiff's damages were limited to the amount set forth in its amended claim.

8. In its Conclusion of Law No. 6, holding that appellant could not recover in excess of \$10,008.70, being amount specified in its original claim dated June 30, 1945 (plaintiff's Exhibit 35).

9. In its Conclusion of Law No. 7, holding that

appellant could not recover on any element of damages not included in its claim of June 30, 1945.

10. In that part of its Conclusion of Law No. 9 which held that appellant was entitled only to recover damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3,753.15), instead of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88), as established by the evidence.

11. By disallowing, in its computation of damages, all overhead expenses established by the evidence, to-wit, the sum of Six Thousand Six Hundred Forty-nine & 82/100 Dollars (\$6,649.82).

12. In that its opinion and decree are not supported by evidence and are contrary to law.

13. In that its opinion and decree are not supported by its Findings of Fact.

14. In that its opinion and decree are contrary to its Findings of Fact and the law. [100]

14. In that its decree as to the amount of delay and the measure of damages is clearly erroneous and is not based upon substantial evidence.

LANCIE L. WATTS,

Attorney for Appellant.

SERVICE STATEMENT

A copy of the foregoing Appellant's Statement of Points was mailed, by registered mail, on May 26, 1948, to the following named counsel for the defendant, to-wit:

1. To Frank J. Hennessy, United States Attor-

ney, attention Rudolph Scholz, 422 Post Office Building, San Francisco 1, Calif.

2. To Paul B. Gibson, Humboldt Bank Bldg., San Francisco, Calif.

LANCIE L. WATTS,
Attorney for Plaintiff.

[Endorsed]: Filed May 27, 1948. [101]

[Title of District Court and Cause.]

ORDER

The above-captioned cause having been appealed to the Ninth Circuit Court of Appeals, it is hereby ordered that all original exhibits offered and received in evidence in said cause in the trial court be transmitted to the Ninth Circuit Court of Appeals for its inspection.

Dated May 26th, 1948.

/s/ CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed June 4, 1948. [102]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the plaintiff, appellant herein, may have

to and including the 6th day of August, 1948, to file the record on appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: June 30th, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed June 30, 1948. [105]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 105 pages, numbered 1 to 105, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Power Service Corporation, a corporation, Plaintiff, vs. W. E. Joslin, doing business as Cory-Joslin and Macnsons, Defendant, No. 26113 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$42.00 and that the said amount

has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 21st day of July, A. D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

/s/ W. E. VAN BUREN,
Deputy Clerk. [106]

In the District Court of the United States, in and for the Southern Division of the Northern District of California.

THE POWER SERVICE CORPORATION,
a corporation,

Plaintiff,

vs.

W. E. JOSLIN, doing business as
CORY-JOSLIN & MACNSONS,

Defendant.

REPORTER'S TRANSCRIPT

This matter came regularly on for hearing before the Honorable Chase A. Clark, District Judge, sitting without a jury, at San Francisco, California, on March 18th, 1947.

Appearances: Lencie L. Watts, Esquire, 801 Searritt Bldg., Kansas City, Mo., Attorney for Plaintiff; Frank J. Hennessy, U. S. District Attor-

ney for the Northern District of California, Room 422 P. O. Bldg., San Francisco; Rudolph Scholz, Esq., 422 P. O. Bldg., San Francisco, Cal., Assistant U. S. District Attorney; Paul B. Gibson, Esq., Humboldt Bank Building, San Francisco Cal., Attorneys for the Defendant. [1*]

March 18th, 1947—10:00 a.m.

(Opening statement and explanation of the relationship of the parties made by Mr. Watts.)

Mr. Scholz: With the consent of the Court and counsel I would like to amend the answer by including for a separate defense, each count, the following: "That the defendant alleges that there was no consideration to the defendant for the addenda or additional clause to the signature page of the contract of the parties hereto."

The Court: Well, the answer may be so amended.

Mr. Scholz: And I will file a written amendment later before this trial is over. Also, counsel for the plaintiff has stated in the opening brief, or the pre-trial brief, which he has filed that there are three counts based on the contract, that is, in Count One of the Petition he asks for damages, and if the Court does not find that he is entitled to damages under the contract, then he asks for a reformation of the contract and for damages. Now, we are confronted, first, with the question,—Does

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

the contract provide for damages? And at this time I would like to make a motion for judgment on the pleadings, and for the record I would like to point out that in the pleadings they have set up, or pleaded, the contract, or a portion of it; that is, [5] they have specifically set forth certain paragraphs of the contract. The first paragraph of the contract as set forth in the Petition deals with the question of furnishing materials, and states that the materials are to be furnished by the constructor. The next paragraph of the contract which is set forth in the Petition is "immediately after starting work under the sub-contract, the sub-constructor shall prepare a list of materials, including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the power house in order that shortages may be immediately determined. Such shortages will then be reported to the constructor for use in obtaining the balance of materials required for the completed works." And then it goes on further to state, "such an inventory will be kept current by the sub-constructor during the progress of the work, and the sub-constructor will be held responsible for advising the constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress." The next paragraph states, "nearly all of the materials required for the work has been stored in power house number one, or in warehouses adjacent thereto." And the balance of that paragraph is not material for

this motion. Then it goes on to quote other portions of the contract, and it comes to what [6] I consider the meat of this motion. It is paragraph "E" of the portion of the contract set forth in the Petition under paragraph four of the Petition, and reads, "in case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the sub-constructor will accept the additional time in which to complete his sub-contract in full satisfaction of any delays encountered, and the constructor will not be liable for any costs or expenses incurred by the sub-constructor as a result of the increased time for completion of the sub-contract." And paragraph "G" is, "No liquidated damages are provided for under the specifications, nor will such damages be provided for in the sub-contract." The contract goes still further and states that under a lump sum contract the sub-contractor has read and is familiar with each and every part of the said sub-contract, and the respective rights, powers, benefits, obligations and liabilities of the United States of America herein called "The Government," and the "Constructor," who in this case is Joslin and the A. E. M., and then it refers to Article VI which is not included; in paragraph 105 is included the paragraph, or sub-paragraph, to which I have called your attention. Article VI, which is now a part of the sub-contract reads, or provides that all disputes concerning questions of fact arising under this [7] sub-contract shall be decided by the contracting officer, whose decision shall be in

writing subject to appeal by either party hereto within thirty days from the receipt of the contracting officer's decision, to the Chief of Engineers, whose decision shall be final and conclusive on the parties hereto. Article V provides that in consideration of the sub-contractor's undertaking hereunder, the sub-contractor shall receive payment for work performed at the lump sum amount set forth in Article I hereof, which shall constitute full compensation for the performance by the sub-constructor of the work and services authorized herein, unless otherwise provided in the specifications. After this offer and acceptance was made, but before the formal contract was signed, there was added to the signature page of the contract the following clause: "This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials, notwithstanding the provisions of paragraph one hundred and five of the specifications." It is our theory that under this contract the plaintiff is not entitled to damages at all. As set forth in Article V the sub-contractor shall receive payment for the work performed at the lump sum amount set forth in Article I., and then in paragraph "G", or subparagraph "G" of 105 no liquidated damages are provided for under the [8] specifications, nor will such damages be provided for in the sub-contract. It is admitted that under the contract without the additional clause that they are not entitled to dam-

ages at all, but their contention is that this clause permits them to sue, prove and collect damages by reason of any late delivery of materials, notwithstanding the provision of Paragraph 105 of the specifications. We contend that it means nothing, because it states that it is signed without intent to waive any right which it may have to prove and collect damages. It is their intent to waive all provisions of Paragraph 105. Now, if we can have a decision on that, then we can proceed to the next question.

The Court: I will pass on that in the final determination of this case. I might say that the case is entirely new to me. However, I observe that Judge Roche over-ruled this motion without prejudice to your raising the question again, and I will determine this question in passing upon the entire case. In making a final determination of the case I will pass on it, because at this time it would require me to take snap judgment, and my opinion now is that I will require you to explain why that clause is in the contract.

Mr. Scholz: Very well. If the Court is reserving his ruling on that, Mr. Gibson will make the opening statement. He is Mr. Joslin's personal attorney. [9]

(At this time Mr. Gibson made an opening statement, or a statement explaining the position of the defendant.)

W. LYLE BORST,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Watts:

Q. Where do you live, Mr. Borst?

A. Minneapolis, Minnesota.

Q. What is your occupation?

A. Mechanical engineer.

Q. With whom, and by whom, are you employed?

A. The Power Service Corporation.

Q. In what capacity?

A. As Chief Engineer. [10]

Q. Will you tell the Court whether or not the work provided for in each one of the three of these modifications as represented by Modifications 1, 2 and 3, in any way delayed the performance beyond the one hundred twenty day period provided for in the contract?

A. No, sir; it was such that it could be done, and was done simultaneously with the regular contract.

Q. What was the date upon which completion should have been established on this contract?

A. November 10th, 1944. [103]

Q. Did you read paragraph 5-04 "B" which provided that you should prepare a list of the materials?

A. Yes, sir.

The Court: Before you go into that, Mr. Watts.

(Testimony of W. Lyle Borst.)

were these change orders completed before the expiration of the 120 days period?

A. The change orders, as such, were completed simultaneously with the rest of the work which was on December 19th.

Mr. Gibson: They were not within the time of the contract.

Q. (Mr. Watts, continuing): Now, I would like for you to give the Court just some idea, very briefly, of the magnitude of the task of making this inventory as a part of your performance of the contract.

Mr. Scholz: Under the specifications given to the plaintiff at the time of the bid, it called for all of this inventory; whether it was a large or small job would have no bearing on this case.

The Court: I think it is immaterial, but he may answer.

A. This work involved going through the materials on hand in the power house proper and in the lot and the area adjacent to the power house, and in warehouses adjacent thereto. It meant a,— [104]

Q. (Interposing): First, tell the Court what was done with respect to the requirement that you make up a complete inventory from the plans and specifications.

A. We took the plans and specifications and our engineering organization in Minneapolis set about to list materials necessary for this work. It was a matter of writing up a proper list of basic materials as shown on the drawings.

(Testimony of W. Lyle Borst.)

Q. In compliance with that provision, did you prepare Exhibit No. 19? A. Yes, sir.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 19, for purposes of identification.)

Q. (Mr. Watts, continuing): Will you identify the exhibit?

A. This is a list showing the piping materials which were taken off the blue prints for the job.

Q. Under whose direction was this prepared?

A. Under my direction.

Q. Where? A. In the Minneapolis office.

Q. When?

A. Immediately following the awarding of the contract.

Q. After you prepared that list what did you do with respect to that part of your specifications which required you to take a field inventory and check it against this material listed which was made in your home engineering office? [105]

A. I set about that with the aid of men we hired going through the material on hand and making a list of those materials, assigned numbers to all the materials which were shown on the list, so that we could identify these materials in the process of using them.

Mr. Watts: I now offer in evidence Exhibit No. 19.

Mr. Scholz: Apparently this was prepared over a period of time by different people?

(Testimony of W. Lyle Borst.)

Mr. Watts: He testified that it was under his direction by engineers in his home office.

Mr. Scholz: What engineers were they in your home office?

A. Mr. Forkey,—N. D. Forkey, and H. E. Brokoff,—I think maybe Mr. Forkey's initials will appear on the work sheets.

Q. (Mr. Watts, continuing): When did this work start? A. About the 13th or the 14th.

Q. Will you tell the Court whether or not each page of this document,—all of the pages included in Exhibit No. 19 have been dated?

A. Yes, sir.

Mr. Watts: We offer this in evidence.

The Court: Is there any objection to the admission of this exhibit? [106]

Mr. Scholz: Nothing, except the standing objection. Of course, we cannot see the materiality of it.

Mr. Watts: We were required to perform this contract and one of the things was the preparing of this list.

Mr. Scholz: I think we have admitted that you did prepare an inventory.

The Court: I think I will admit the exhibit.

(Whereupon Plaintiff's Exhibit 19, so marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Will you tell the Court what the typewritten part of the exhibit refers to?

A. Yes. The typewritten part refers to the

(Testimony of W. Lyle Borst.)

take-off, or the listing of the material as it came from a perusal of the drawing. There is a column showing the total quantity of the material required, and then we set about to determine what material was available. Now then, for example, you notice on the first item there are three on the job, which corresponds to the description of the number required, so it meant that we didn't require any additional material of that kind; and so we have a zero in that column under the particular description.

Q. Where did you get the information from which these pencil notations were made on Exhibit No. 19?

A. This information was obtained by going through the [107] material at the site, and taking a list as prepared there, and comparing it as against this list marking down the material as it was found, and thereby getting a cross-check.

Q. And what was done with this list after they were posted to this Exhibit No. 19?

A. They were in pencil form, and we didn't keep those lists.

Q. Does Exhibit No. 19 show the missing items required that you had to requisition?

A. Yes, sir.

Q. In what manner did you notify the defendant that this missing material was required?

A. We filed that formal requisition, or forwarded it to Cory-Joslin showing the material required on the job.

(Testimony of W. Lyle Borst.)

Mr. Scholz: You mean by "missing," that it was not on the site?

A. Yes, sir; not on the site at all.

Q. (Mr. Watts, continuing): Now, will you relate exactly what you did to get the missing material?

A. We wrote a formal requisition to Cory-Joslin of the exact items, and they were listed, of the materials that we needed.

Q. Exhibit No. 20, Mr. Borst, will you identify that?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 20, for purposes of identification.) [108]

A. That comprises copies of our requisitions made to Cory-Joslin.

Q. Those were made over what period of time—about how many of them?

A. They were made immediately upon starting the job, the earliest one was on July 26th, I believe.

Q. And did you continue to furnish those requisitions to the defendant throughout this contract?

A. Yes, sir; we kept them current.

Q. And how quickly would you get this material?

A. Well, this would come in within hours, some of it, and from hours up to two or three days.

Q. Where would these materials be obtained?

A. Ordinarily obtained from the main supply

(Testimony of W. Lyle Borst.)

ordnance at Sunflower. Some was pick-up materials from the storehouse and supply depot, where these materials could be drawn from.

Q. Will you explain the general nature of most of the material in Exhibit No. 20?

A. A great deal of this material consisted of pipe, valves, and fittings, gaskets, hangers, and raw material, such as angle-iron, and gasket materials.

Mr. Watts: We offer in evidence Plaintiff's Exhibit No. 20. It is simply offered for the information of the Court.

The Court: Is there any objection, Mr. Scholz?

Mr. Scholz: No objection, your Honor.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 20 so marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) Now, Mr. Borst, I am reading the following from the provisions and specifications—it is paragraph 1-10 on page 1-5 of Exhibit No. 2, and it comes under the heading, "Organization, Plant, and Progress:" " 'K.' The subconstructor shall within seven days after receipt of the notice to proceed, prepare and submit to the constructor for approval a practical and feasible schedule showing the order in which the subconstructor proposes to carry on the work, the date on which he will start the several salient features (including procurement of plant and equipment) and the contemplated dates for completing

(Testimony of W. Lyle Borst.)

the same. The schedule shall be in the form of a progress chart of suitable scale so as to indicate approximately the percentage of work scheduled for completion at any time. The subcontractor shall enter the actual progress at the end of each week, and shall immediately deliver to the constructor three blue print copies of the same." Now, Mr. Borst, I want you to first tell the Court what you did with reference to complying with that provision of the contract?

A. At the very outset of the work I set about to prepare [110] this progress schedule.

Q. When, with reference to July 13th, the date you received notice to proceed, was it that you commenced work on that progress schedule—where did you do it, and when?

A. I began the work on that definitely about July 14th, or 15th. It was before we had been able to set up a field office. Mr. Smith of Broderick & Gordon people was kind enough to let me use a desk in his office for a period of days, and I used that space and worked on that progress chart. Most of the time I was in that office.

Q. Mr. Borst, please identify Exhibit No. 50 for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 50, for identification.)

A. That is a copy of the progress schedule that I prepared, and it has been marked with colored

(Testimony of W. Lyle Borst.)

pencil to show modifications made while it was under discussion.

Q. Tell the Court when the first copy of the progress schedule was delivered to the defendant in this case, with reference to July 13th, 1944.

A. That was within seven days.

Mr. Scholz: What is the date of that progress schedule?

A. This particular schedule that I have here does not bear any formal date, other than this: It has a crayon written [111] date of August 17th, 1944, and in the same notation it says "Final, as revised." At that time the matter of satisfaction to all of the parties concerned relative to the final sheet of this schedule had been determined, and I had put this modification date on this.

Mr. Scholz: The date is August 17th.

A. Yes.

Mr. Watts: I now call upon counsel for the defendant to produce, in accordance with the subpoena, and notice served upon counsel, to produce the original schedule delivered by Mr. Borst before any revision was made.

Q. (Mr. Watts, continuing:) Mr. Borst, will you please tell the Court when you delivered the first copy of that construction schedule to the defendant?

A. That is the first draft.

Mr. Scholz: He didn't ask for the first draft, and we object to that as not being responsive.

(Testimony of W. Lyle Borst.)

The Court: If you understand the question, Mr. Witness?

A. Perhaps, I am a little confused.

Q. (Mr. Watts, continuing:) When did you deliver the first draft of the progress schedule to the defendant in compliance with the provisions of the contract?

A. Within the seven day period.

Q. What happened so far as approval of it is concerned [112] after you delivered it to the defendant?

A. That first draft gave rise to several conferences, and the parties thereto asked for a revision on my part.

Mr. Scholz: You mean you had a conference with Joslin and he asked for a revision of that?

Mr. Watts: Now, Mr. Scholz, if you will just let me develop this?

Mr. Scholz: I think it is objectionable on account of the fact that we don't understand what he means by "they" or when he says "The Parties."

A. Representatives of the Cory-Joslin people, Mr. Wedlick and I would point out that the Army Engineer, Major Matthews, was the final party with whom those things were to be satisfactory, and his satisfaction was to be passed on through the Cory-Joslin people, so that any conferences we had, were held jointly with the Cory-Joslin people, and the Major was there, too.

Q. (Mr. Watts, continuing:) Did you submit

(Testimony of W. Lyle Borst.)

that progress schedule—just tell the Court whether or not you had learned that there was a shortage of water-wall tubes and headers before you submitted that progress schedule?

A. Yes, sir; we did.

Q. Did you shortly thereafter, and before the defendant and the Government approved the schedule you had submitted to them, did you write a letter to the defendant putting them on [113] notice of the missing materials, to-wit: The tubes and the headers?

A. Yes, sir. It was common knowledge.

Q. Will you identify Exhibit which has been marked No. 4?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 4 for purposes of identification.)

A. That is a letter written by the Power Service Corporation to Cory-Joslin & Macnsons at the Sunflower Ordnance Works.

Mr. Watts: I offer in evidence now Plaintiff's Exhibit No. 4.

The Court: Do you have any objection?

Mr. Scholz: None.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 4, so marked for identification, was admitted in evidence.)

Mr. Watts: This is a letter signed by Mr. Borst. It is dated July 26th, 1944, and addressed to Cory,

(Testimony of W. Lyle Borst.)

Joslin & Macnsons, Sunflower Ordnance, in care of William F. Lozier, Incorporated, Broderick & Gordon, Kansas City, Missouri, and is as follows:

“Gentlemen:

“In connection with our subcontract for complete erection of boilers in Power House No. 1, Sunflower Ordnance [114] Works, Johnson County, Kansas, we wish to advise of a major shortage of materials which will delay the progress of our work beyond our contract schedule.

“This material consists of water-wall tubes for all three of the boilers which we are to erect. In order for us to complete our work in the one hundred twenty days period required, it will be necessary for us to have delivered to the job sufficient tubes for one boiler by August 1st, 1944; sufficient tubes for a second boiler by August 8th, 1944; and the balance of the tubes for the third boiler by August 15th, 1944.

“Very truly yours,

POWER SERVICE CORP.,

W. LYLE BORST,

Chief Engineer.”

Q. (Mr. Watts, continuing:) Did you get a response to this letter? A. Yes, sir.

Q. Identify Exhibit No. 5, for the record, if you will, Mr. Borst?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 5, for purposes of identification.)

(Testimony of W. Lyle Borst.)

A. That is a letter from Mr. Wedlick to the Power Service Corporation.

Q. And now, will you please identify Exhibit marked No. 6? [115]

(Whereupon document referred to was marked Plaintiff's Exhibit No. 6, for purposes of identification.)

A. That is a copy of a letter from Mr. J. S. Hagan, Chief Engineer, to Mr.—to Cory, Joslin.

Q. Did Exhibit No. 6 accompany Exhibit No. 5 when you received it?

A. Yes, sir; they did.

Mr. Watts: We offer in evidence both of these Exhibits as No. 5 and No. 6.

The Court: Is there any objection?

Mr. Scholz: No objection so far as Exhibit 5 is concerned, but as to Exhibit No. 6, we make the same objection, unless they connect it up with the defendant in this case.

The Court: Both of the exhibits may be admitted at this time.

(Whereupon Plaintiff's Exhibits 5 and 6, so marked for identification, were admitted in evidence.)

dence.) [116]

Q. (Mr. Watts, continuing:) Up to that moment had this progress schedule been approved by any of the parties involved in this case?

A. No, sir; it had not.

(Testimony of W. Lyle Borst.)

Mr. Watts: And attached to this letter is a letter from Mr. Hagan which reads:

“The effect of the shortage of water-wall and roof tubes for Combustion Engineering Company’s boilers, and the completion of Power House No. 1 has been broached in Power Service Corporation’s letter of July 26th, 1944, to you.”

This is addressed to Cory, Joslin & Macnsons, and is, as I said, from Mr. Hagan, their Chief Engineer.

“Although it is desirable to have all the materials on hand at the start, an analysis of the usual construction procedure for boilers of this type, and local conditions, indicates that the ultimate one hundred twenty day completion period will not be affected if the above tubes for the first boiler are delivered on the job by August 15th, 1944, and the tubes for the other two units are delivered in successive intervals of about one week.

“I don’t believe that the water-wall and roof tubes [117] should, or could, be erected until the boiler tubes are installed, due to interference in handling and safety hazards.

“The progress of the work indicates that no ultimate delay would result if the tubes for one boiler are delivered by August 15th, 1944, and the balance in order.

/s/ J. S. HAGAN.”

Q. (Mr. Watts, continuing:) With respect to this letter, Mr. Hagan’s position was that the tubes

(Testimony of W. Lyle Borst.)

for the first boiler should be received August 15th and tubes for the second on August 22nd, and for the third boiler on August 29th. What did your original schedule provide as to when these tubes should be received?

Mr. Scholz: We object to this as the schedule would be the best evidence.

The Court: Yes; that is right.

Q. (Mr. Watts, continuing:) Does this original schedule, Exhibit No. 50, indicate the date on which the tubes were required for these three boilers?

A. Yes, sir. I have a column under that heading indicating Boiler No. 1, Boiler No. 2, and Boiler No. 3. This is under "Steam Generating Units," and is broken down "to putting in water-wall tubes," and there I have indicated the three boilers again. Here we have the system of charting. Each of these [118] little lines is a day, and this space in here (indicating) comprises a month, so that you see in working here, I indicate that we would require water-wall tubes for this boiler on the 26th of July, the next on the 27th, and the third about the 8th of August.

Q. As a result of this letter by Mr. Hagan in which he insisted on the first one, that is, the tubes for the first boiler be set up to August 15th, 1944, and the second to August 22nd, and the third to August 29th, will you tell the Court whether or not a controversy arose over the approval of the schedule that you prepared?

(Testimony of W. Lyle Borst.)

A. Yes, sir; that is correct. There was a discussion.

Q. As a result of that, will you tell the Court whether the original construction schedule that was submitted about July 20th, 1944, was subsequently revised?

A. Yes, sir. That is what I have here.

Q. I ask you to identify this exhibit which has been marked No. 51.

(Whereupon document referred to was marked Plaintiff's Exhibit 51 for purposes of identification.)

A. This is the final form of the progress schedule as worked out and revised on August 17th. It is simply a permanent, or tracing, from which these blue prints are made, and is exactly as shown by the crayon lines on this other exhibit. [119]

Q. Point out to the Court what you mean.

A. Well, you can see that this was marked. There is a change from here (indicating) to the first of August; on this same line appears as a correction on the first of August. The final draft was so made.

Q. Whose duty was it to finally approve the construction or progress, schedules which you submitted?

A. Major Matthews of the Area Engineer's Office.

Q. What date did he approve those?

A. The revised schedule, on August 17th.

(Testimony of W. Lyle Borst.)

Mr. Scholz: In view of that fact, I move to strike all of the testimony regarding the schedules. We now have the date. Apparently, they had a consultation and agreed upon the schedule. It has finally developed that this was the final schedule, and I don't think these conversations or conferences are material in this case.

Court: I will let the evidence stand, with the understanding, of course, that it is consummated in this approval.

Mr. Watts: Our purpose is to rebut the statement made by counsel that we delayed in furnishing these schedules.

The Court: Very well, gentlemen. You may proceed.

Q. (Mr. Watts, continuing): I hand you exhibit marked No. 52, and I will ask you to identify that for the record, Mr. Borst. [120]

(Whereupon document referred to was marked Plaintiff's Exhibit No. 52 for purposes of identification.)

A. That is a construction schedule for the Power Service Corporation as made up in the Area Engineer's Office, or in the office of Lozier, Broderick & Gordon. It is a compilation of the information of our own schedule, and takes the form which is common to all of the schedules that we used throughout the work on the area. It was commonly used. Major Matthews employed this in his office so that he could—

(Testimony of W. Lyle Borst.)

Mr. Scholz (Interposing:) We object to that as not binding on the defendant, and also by reason of the fact that it was not made in the presence of this witness.

The Court: It does seem immaterial so far, but I think it may stand.

A. (Continuing:) This schedule bears the approval of Major Matthews of the Engineering Corps and shows my schedule and the signature as of August 17th, 1944. The signature of Major Matthews is shown as of August 22nd, 1944, and the date of the report is August 18th, 1944.

Q. (Mr. Watts, continuing:) Now, Mr. Borst, tell the Court what finally happened with respect to this controversy, or discussion referred to in the letter with Mr. Hagan where he insisted that the tubes for Boiler No. 1 could be delivered by August 15th, and the next on August 22nd, and the next on August 29th. What was the schedule finally approved of by [121] all of the parties to this litigation.

Mr. Scholz: We object to that, unless he states the time, the place and who were present at these conversations.

Q. (Mr. Watts, continuing:) Relate just what transpired from the time the first draft of this schedule was presented until it was finally approved by the Government with respect to Mr. Hagan's participation, and Mr. Wedlick's participation in agreeing upon the production schedule.

(Testimony of W. Lyle Borst.)

Mr. Scholz: Now, we object to that. It does not show who was present at the time.

A. I can tell you that.

The Court: Just go ahead then.

A. At this date, on the 17th, the date on which that schedule was approved, there was a meeting at which were present Mr. Wedlick, representing Cory, Joslin; Major Matthews and Mr. Hagan, and I think Mr. Thomas was there, too. He had charge of working out this particular form of schedule. I think that was in Thomas' office. If I remember distinctly, that is where it was. That day when we came to an agreement, and the approval of the schedule—the dates I have established on the chart, August first for the first boiler; August 7th for the second, and August 15th for the third, would be the controlling dates.

Q. (Mr. Watts, continuing:) Was Mr. Wedlick at that conference? [122] A. Yes, sir.

Q. Did he agree to that schedule the same as you? A. Yes, sir.

Q. And he represented Cory-Joslin?

A. Yes.

Q. Was that the last of a number of meetings in connection with the schedule? A. Yes, sir.

Q. Was the real progress chart, as distinguished from the progress schedule, made by showing exactly how far you had progressed each week thereafter? A. Yes, sir.

Q. Will you tell the Court what Exhibit No. 52 is, that is, as illustrative of these charts?

A. From the data contained here—first, we will

(Testimony of W. Lyle Borst.)

call attention to the weekly charts. This line here (indicating) represents the entire work for the job, and it consists of only an outline block stretching from the time of starting on the 13th of July to the 10th of November. Now this is further broken down to six divisions: The piping systems; the pipe covering and installation; Boiler No. 1, steam generating unit; Boiler No. 2; Boiler No. 3, and auxiliary equipment. Now under Boiler No. 1 the first item, "set drums, tubes, water-wall headers and tubes;" this means that the work [124] of setting the drums, water-wall tubes and headers, was to be done here (indicating). The setting of the pulverizers, burners and soot-blowers was of this date (indicating), and the setting of the brick work on this date (indicating). This was to be the finish. The boiler exterior casing was of this date indicated by these blocks, and there is also the ash-hopper lining, induced and forced draft fans and drives, and the dryout. There was submitted weekly by the inspector and engineer, or the resident engineer for Broderick & Gordon a report which was checked by myself of the actual progress made during the week on the work there, on the various kinds and characters of work, and this was set down each week in the form of black lines showing the percentage of completion, and there was simultaneously set down in this chart a cross-hatch line which would show the amount of work that should have been done, or that would be expected, to keep the work up to schedule. There is also a curve shown

(Testimony of W. Lyle Borst.)

on this chart which starts at the bottom and ends in here (indicating) near the top of one hundred per cent, showing the trend which the job would have to follow if it were to be considered on schedule. On this particular week, which was August 22nd, we were behind schedule in this amount—first, we will take this curve here (indicating). We will represent that as curve “A” for identification. Now this curve “A” represents the over-all progress which should [124] be made between the starting time of July 13th and the date of November 10th, in which time one hundred per cent of the entire job should be completed. At this particular date this report is dated August 18th, and on this date we have progressed as is indicated by the curve, which we will indicate as curve “B” on the chart, and this curve shows that we had reached on August 18th about nineteen and one-half per cent complete on the job, at that particular time, and as of that date curve “A” would show that we should have completed about twenty-four per cent of the job. That same information is shown on the chart. At the top is an outline which we will indicate as “C”, and is designating the total contract. The black line under that curve “C” shows us to be some fifteen per cent complete, while the cross-hatched lines indicate that we should have been nineteen and one-half per cent complete.

Q. Let me interrupt, Mr. Borst: Was it possible for you to look at the progress chart, and was it possible for Mr. Wedlick to look at the progress

(Testimony of W. Lyle Borst.)

schedule and chart and tell on each day what type of work was to be performed according to this progress chart and schedule, and what type of material must be on the site for the installation, according to the chart?

A. Yes, sir; it was possible.

Q. Was that the purpose of it?

A. Yes; that was the purpose. [125]

Q. (Mr. Watts, continuing:) Were there any requirements made upon you that you submit this original progress schedule, and make what we call a progress estimate, or break-down, and deliver it to the defendant in this case?

Mr. Scholz: I submit that what was required is in the specifications, and of course that is the best evidence.

The Court: That may be true, but I will permit him to answer.

A. We did comply in submitting the break-down as required in the contract.

Q. Will you identify Exhibit No. 10, if you please?

(Whereupon document referred to was marked Plaintiff's Exhibit 10, for purposes of identification.)

A. Yes, sir; this is a letter which we wrote to Cory-Joslin giving this information.

Q. And the date of that letter?

A. August 10th, 1944.

Mr. Watts: We offer Exhibit No. 10 in evidence.

(Testimony of W. Lyle Borst.)

The Court: Do you have any objection?

Mr. Scholz: We have no objection. [126]

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 10 so marked for identification, was admitted in evidence.)

Mr. Watts: It is a letter dated August 10th, and written by the Power Service Corporation to Cory, Joslin & Macnsons, for the attention of Mr. F. V. Wedlick:

"RE: Completion of Power House No. 1, Lump Sum Subcontract No. 5 to Fixed Fee Subcontract No. 5." and the first paragraphs read as follows:

"Gentlemen:

"We submit herewith the following revised break-down of our total contract price to agree with the items listed on our progress schedule chart. This method of outlining of our progress estimates break-down was discussed with Mr. Hagan and Mr. Thomas of Lozier, Broderick & Gordon.

"Please void or destroy our original progress estimate break-down submitted with our letter of August 7th, 1944.

"Progress estimate breakdown. REvised August 10th. Completion of Power House No. 1, Sunflower Ordnance Works, Johnson County, Kansas, Power Service Corporation, Lump Sum Subcontractor, L. S. Subcontract No. 5 to F. F. Subcontract No. 5. Lozier, Broderick & Gordon, Architect-Engineer-Manager, Prime Contract No. W-461-Eng-10274. Cory, Joslin & Macnson, constructor, Fixed Fee Subcontract [127] No. 5 (mechanical)." and then

(Testimony of W. Lyle Borst.)

follows the break-down, showing the price opposite each type of work which aggregated the total of \$448,000.00.

Q. (Mr. Watts, continuing:) I think you testified that this chart shows the exact date upon which the company must have present enough labor to perform the contract in the one hundred and twenty days schedule? A. Yes, sir.

Q. It indicates the date upon which the defendant is required to furnish the material so that the contract may be completed in the one hundred and twenty day scheduled, does it not?

Mr. Scholz: We object to that as leading.

Mr. Watts: I agree. It is leading.

Q. (Mr. Watts, continuing:) What does this chart show so far as the obligation on the part of the defendant is concerned to furnish material?

Mr. Scholz: The question is objected to, as the chart is the best evidence.

The Court: Of course that would be understood by the Court.

Q. (Mr. Watts, continuing:) Let us take, for example, Mr. Borst, the tubes of boiler No. 1, when does the chart show that the tubes for boiler No. 1 must be present? [128]

Mr. Scholz: We object to that. The contract specifies the terms, and not the chart, and if it is in the chart, then it is the best evidence.

The Court: Does the chart show it?

Mr. Watts: Yes, and it is made in conformity with the contract.

(Testimony of W. Lyle Borst.)

The Court: Then the chart, of course, is the best evidence.

Q. (Mr. Watts, continuing:) Will you indicate where the chart indicates that, so far as the Power Service Corporation is concerned, and the defendant is concerned—that is, when the material was to be delivered to them, or by them, and I understand, Mr. Borst, you are now referring to Exhibit No. 52?

A. Yes, I am. And on this particular account, we have here “tubes,” under boiler number one, “Water-wall headers and tubes.” That whole group must be there at the date indicated.

Q. On what date?

A. Starting in as of July 19th. The pulverizers and exhausts start on July 31st.

Q. Were the tubes available in accordance with that schedule chart on the 19th of July?

A. No, sir; we didn't receive those.

Q. Were the weekly schedules, or weekly charts, made up during each week showing the exact amount of progress [129] made by your organization?

A. Yes, sir; that is right.

Q. I now hand you Exhibits No. 53 to 63, inclusive, and I will ask you to identify these for the record.

(Whereupon documents referred to were marked Plaintiff's Exhibits 53 to 63, inclusive, for identification.)

A. These are charts which the company forwarded each week, and which included the charted

(Testimony of W. Lyle Borst.)

information for that week. They are consecutive.

I don't think that we have all of them here, but the major ones are here.

Q. (Mr. Watts, continuing:) Is Exhibit No. 64, which has also been handed you, one of those?

(Whereupon document referred to was marked Plaintiff's Exhibit 64, for purposes of identification.)

A. Yes, sir.

Mr. Watts: We now offer in evidence Exhibits No. 53 to 64, inclusive.

The Court: Is there any objection?

Mr. Scholz: No objection.

The Court: They may be admitted.

Q. (Mr. Watts, continuing:) Generally, Mr. Borst, with respect to Exhibit No. 52, what do they show—I will include all of those exhibits from 52 to 64—what do they show?

A. The progress as gained each week. [130]

Q. What was done from week to week with respect to the heads of the various organizations concerning the progress of the job?

Mr. Scholz: We object to that. It is very vague.

Q. Will you state whether or not weekly progress meetings were held? A. Yes.

Q. And was Mr. Wedlick, representative of the Cory-Joslin people, present at these meetings while he was there? A. Yes, sir.

Q. And who took his place as project manager?

A. Mr. Vasicek.

(Testimony of W. Lyle Borst.)

Q. Did he attend these weekly progress meetings? A. Yes.

Q. Will you tell the Court whether or not while Mr. Wedlick was there, whether he ever made any complaint at any time against you, or any of your organization, with respect to the manner in which you maintained your schedule?

A. No, sir; he did not.

Q. Did Mr. Vasicek make any complaint as to the manner in which you were following your schedule? A. No, sir.

Q. Did you get any complaint from the A-E-M with respect to delaying the progress on this job?

A. No, sir.

Q. Did you have any complaint, or ever get a complaint, from the contracting officers of the United States Government that you were delaying this job? A. No, sir.

Q. Have you had any complaints from Joslin about not upholding your schedule?

A. No, sir.

Q. What did Mr. Wedlick say about holding you to a strict performance of your schedule?

Mr. Scholz: Is that in writing?

Mr. Watts: I asked what he said.

A. Mr. Wedlick said that he would expect us naturally to keep up with the progress of the work. If we did, everything would be all right and everyone would be happy, and if we didn't, he would tell us in no uncertain terms, which he would be expected to do.

(Testimony of W. Lyle Borst.)

Q. Will you tell the Court whether in your opinion this construction schedule is reasonable, taking into consideration all of the factors that existed there at that time?

A. Yes; that was a well thought through schedule in its final form, and it was reasonable.

Q. Was it approved by the Government?

A. Yes, sir. [132]

Q. And by the A-E-M? A. Yes, sir.

Q. And was it approved by Cory-Joslin?

A. Yes, sir.

Q. Now, I want you to tell something about the delays in the performance that you experienced; first, to show the relation of the boilers to each other, I hand you Exhibit No. 47, 47-A, will you identify this for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit 47-A, for purposes of identification.)

A. Yes, sir. That is one of the Hercules Power Company's drawings showing the plan.

Q. I wish you would spread that out and briefly describe the location of the three boilers upon which your organization did its work.

Mr. Watts: I offer it in evidence at this time.

A. This would indicate an architectural drawing of the building. It is some 159 by 104 feet. This view shows the building in which we were working. It is 159 by 104 feet, in which are located three boilers, or three boiler units, designated one, two

(Testimony of W. Lyle Borst.)

and three. That represents the approximate size, or the size in comparison with the building.

Mr. Scholz: That is a reasonable picture of what it represents? [133]

A. Yes, sir.

Q. It is approved by all of the parties?

A. Yes.

Q. I show you now Exhibit No. 47-B, will you tell the Court what that is, please?

(Whereupon document referred to was marked Plaintiff's Exhibit 47-B for purposes of identification.)

A. This shows a view looking at the boilers from inside. It shows two of them. In fact, this boiler is boiler No. 3. Here is the center line (indicating). The approximate height is about sixty feet, and here the building is about sixty-five feet, comparable to a four or five story building.

Mr. Gibson: Is the elevation shown?

A. Yes.

Mr. Watts: We offer Exhibits 47-A and 47-B in evidence.

The Court: Is there any objection?

Mr. Scholz: No objection.

The Court: They may be admitted.

(Whereupon Plaintiff's Exhibits 47-A and 47-B, so marked for identification, were admitted in evidence.)

Q. (Mr. Watts, continuing:) Now, Mr. Borst, I wish you would step down here to this exhibit

(Testimony of W. Lyle Borst.)

which is marked Exhibit No. 48, and tell the Court what this exhibit is. [134]

(Whereupon document referred to was marked Plaintiff's Exhibit 48, for purposes of identification.)

A. This is a picture of a steam generating unit, or a boiler unit, of the general type and character that we are dealing with. It is not a drawing of the exact job, this being a war job, these are not available. This is retouched, so that one can see how it looks. It is retouched by a commercial artist.

Q. (Mr. Watts, continuing:) And—

Mr. Watts: I will offer this.

Q. The purpose of bringing it here is what, Mr. Borst?

A. To show the general character of the material we were dealing with, the drums, the tubes, and the headers.

Q. Will you point out the parts that are involved in this litigation—the water-wall tubes and the headers, so that when we refer to them in the testimony the Court will have a clear understanding of what you mean?

A. To begin with, this machine is a boiler to make steam. This is a unit in which the steam is generated inside a series of tubes, and released into a drum at the top of the unit. There is also a drum at the lower section. The drums are connected with tubes from the lower drum to the top drum, and

(Testimony of W. Lyle Borst.)

form a passageway so that the water that forms **the steam is always inside** of the tubes.

Q. Are these furnace tubes (indicating)?

A. In addition to that, we have an area which is nothing more than the space where the flame is introduced by two burners. I think there were four burners. Fuel is introduced, and there is, as I said, the space where the flame is introduced. The sides of this chamber, or furnace, are composed of tubes carrying water into the drums, so that the entire surface of the side is protected in that the heat built up is transferred to a water-wall surface. We do have the area of water-walls designated as the side water-walls and the roof water-wall. This unit here (indicating) is the structural support for the same, to carry the entire structure here (indicating.) After the tubes and drums and headers are in place,—the headers are a method, or unit, to allow, or for allowing the tubes to terminate,—headers in which the tubes will terminate at the top and bottom. On the outside we find a casing which is a steel packet. Between that casing and the tubes is a system of refractory material which is a fire-resistant clay insulation material, so that the heat, even though a major portion of it is confined to the sides of the water-wall, this is protected so that the outside steel casing,—in this case we have transite, and it remains cool to the touch of the hand.

Q. Will you point out where you find the side

(Testimony of W. Lyle Borst.)

water-wall tubes, the back water-wall tubes, and the front water-wall tubes, the roof tubes, the roof header? [136]

A. Here, here and here (indicating).

Q. Do you have any other tubes that are not apparent?

A. I think that encompasses the basic tubes, other than the boiler tubes. The water-wall device is something that has been developed recently. There is a boiler made that consists of drums with a series of tubes in between for the purpose of generating heat, and then the idea came to put the water-wall on the outside of the furnace and keep the heat in the jacket of the walls.

Q. Will you tell the Court whether there is any well-recognized plan of procedure under which you erect one of these boilers?

A. Yes, sir. It is common practice that certain moves be made at certain times, or at particular times.

Q. There are about eight principal steps that must be taken in the erection of these units: is that right?

A. Yes, sir.

Q. Will you tell the Court these steps, and the order of taking them?

A. Well, the first is the structural steel supports. They are set in place, and then the major boiler drums would be placed.

Q. Indicating by step one, step two, and so forth.

A. Step one would be the structural steel; step two would [137] be the getting of the drums in

(Testimony of W. Lyle Borst.)

their locations, and then would be the erection of the water-walls, headers, and then the starting of the fourth step would be the installation of the tubes in the boilers and the tubes in the water-walls, and then would come the hydrostatic tests after all the tubes were completely in place, the boiler filled with water and pressure pumps installed to see that the water would not leak out. After that would come the brick work, step six, and the jacket is step seven, and step eight comprises the additional work such as putting in the internal exhaust of the drum, the gauge connections, the combustion control and instruments, and all of the appurtenances.

Q. Now, Mr. Borst, normally in that sequence of installation where does the installation of the water-wall tubes come?

A. About the third and fourth steps.

Mr. Watts: Now, we offer in evidence Exhibit, which I think is 49, instead of 48, as I have indicated before.

Mr. Scholz: That is for the purpose of illustration only?

Mr. Watts: Yes.

The Court: It may be admitted for that purpose.

(Whereupon Plaintiff's Exhibit No. 49, so marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): I hand you Exhibit No. 48 [138] and I will ask you to identify that for the record.

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit No. 48 for purposes of identification.)

A. This is a picture in general of a power plant of the character that we were dealing with.

Q. Is it possible to obtain a picture of this power house?

A. No, sir; this is a Government project in an effort,—a war effort, and it was impossible to get a picture.

Mr. Watts: We offer in evidence now Exhibit No. 48 as a matter of illustrating the kind of power house in which these units were constructed.

Mr. Scholz: According to what Mr. Joslin tells me it is not a very representative picture, but if it helps the Court as being illustrative, we have no objection.

The Court: We will admit it for what it is worth.

(Whereupon Plaintiff's Exhibit 48, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Now, Mr. Borst, what are the advantages in the performance of boiler erection such as this contract was, in following these eight steps in sequence that you have outlined?

A. Well, it would be that the material is put in place in the most economical way, and also that it would make certain that it would give you the most correct results in the final [138-A] assembly.

Q. What is the effect of following this normal

(Testimony of W. Lyle Borst.)

sequence and of following a sequence not in the manner in which you have testified, so far as economy is concerned?

A. It would be more difficult to install, and it would be more costly to take some other approach.

Q. Tell the Court the effect of following this sequence in some,—as compared to other sequence in regard to the element of time?

A. It would take longer.

Q. You mean it would take longer to follow some other sequence? A. Yes.

Q. Will you state whether or not the procedure that you have outlined is in accordance with good engineering procedure?

A. Yes, sir; I would say it is entirely common to the industry.

Q. Will you state whether or not the specifications which you followed reasonably contemplated that in the erection of these three units you would follow this procedure about which you have testified?

Mr. Scholz: The specifications call for the method of erection, and this would be his conclusion.

The Court: He may answer. [138-B]

A. That would be the normal interpretation of the specifications.

Q. Tell the Court whether in preparing your bid on this contract and estimating the time and cost of this job you took into consideration this normal sequence of erection?

(Testimony of W. Lyle Borst.)

Mr. Scholz: We cannot be bound by this, what he had in mind. It was up to them, of course, to use their own judgment, and make their own choice. If he can come in and say, "I had in mind this or that," and it would be binding on this defendant, I cannot understand it. I think it would be immaterial.

The Court: I think that is right, but I will permit him to answer.

A. In making up the estimate of the cost which formed the basis of our bid, we inspected and analyzed the plans and the work to be done in the normal procedure and manner.

Q. Will you state whether or not by following this procedure you can hold to a minimum the expenses of moving men and equipment from one operation to another? A. That is true.

Q. What is the effect on crews of men that erect these units when the normal sequence of procedure is followed in construction with respect to waiting, or rather, in respect to moving from one job to another without waiting?

Mr. Scholz: We object to that on the grounds heretofore [138-C] stated.

The Court: He may answer.

A. This procedure would enable your crew to move from one phase of the work to another in an orderly manner.

Q. Tell the Court whether or not when you received notice to proceed on July 13th you were

(Testimony of W. Lyle Borst.)

ready to proceed according to this established plan of procedure? A. Yes, sir.

Q. State whether or not, in your opinion, with the organization you had, whether or not you could have completed this job if you had been permitted to follow the normal sequence of procedure and had all the essential and critical parts of these units on hand, and ready for installation, in accordance with the schedule that was agreed upon with the defendant?

A. We could have completed them on schedule.

Q. In how many days?

A. One hundred twenty days.

Q. Tell the Court whether or not this sequence that you have described was followed in the erection of these three units at the Sunflower Plant.

A. No; we were interrupted.

Q. Tell the Court, or give some example where you reversed the schedule in certain instances.

A. Yes, sir. Normally, we would have worked on all of the [138-D] steam generating pressure power units at one and the same time, fitting in drums and tubes in the boiler and then lining the water-wall headers and the tubes in the water-wall system so that we could have it in proper alignment in the entire system.

Q. That would be what steps?

A. Three and four.

Q. What were you forced to do in this instance?

A. We were forced to deal with the water-wall

(Testimony of W. Lyle Borst.)

tubes and with the headers with only a portion of the tubes there.

Q. So that in the sequence which normally would be steps three and four, where did the installation of the water-wall tubes come in this contract?

A. That would be along about four and five.

Q. Did you keep from week to week as a part of your duties as the project manager, or the head of this project at Sunflower, a report?

A. Yes, sir.

Q. Did you make written reports as a part of your duties? A. Yes, sir.

Q. Were these reports prepared and dictated by you? A. Yes, sir.

Q. In these reports did you make a record of the delays that you had suffered, and the reasons for these delays? [138-E]

Mr. Scholz: Objected to as self-serving.

The Court: He may answer.

A. Yes, sir; we did.

Q. (Mr. Watts, continuing): Do you have those records? A. Yes, sir.

Q. Mr. Borst, turn to the first record of any delays, and I want you to refresh your recollection from that report, and independent of the report tell the Court what delays there were, and give the Court the days and the exact description of the delays that you suffered.

A. On August 2nd it was determined for one thing that [138-F] certain boiler tubes were de-

(Testimony of W. Lyle Borst.)

fective, and the matter was brought to the attention of Mr. D. C. Smith and Mr. Neubauer to report the damaged or defective tubes to Hercules Power Company.

Mr. Scholz: Do I understand you claim damages because the material was defective, or because it was not there?

Mr. Watts: Upon two things: That the material was not there, and in the second place, that defective material was on the job and had to be refabricated before we could proceed.

Mr. Sholz: I thought the contract specified that any defective material would be replaced without cost to the subcontractor, and I think he is not entitled to damage for any defective material.

Q. (Mr. Watts, continuing): Now, Mr. Borst, you may proceed and state the delays you experienced according to your records. Refresh your recollection with your records, and then testify as to the facts.

Mr. Sholz: I think an objection should be noted unless this material which he is looking over was made by himself at the time. [139]

The Court: You may inquire about that.

Mr. Sholz: You have a file in your hand?

A. Yes, sir.

Mr. Sholz: What does that purport to be?

A. These are records in the form of weekly reports that I wrote to the home office.

Mr. Sholz: At the time that they bear date?

A. Yes, sir.

(Testimony of W. Lyle Borst.)

Mr. Sholz: That is all that file is?

A. Yes, sir; it is.

Mr. Sholz: Our objection is withdrawn, if the Court please.

The Court: You may proceed.

Q. (Mr. Watts, continuing): The last date to which you testified was August 2nd. Now, you may proceed, Mr. Borst.

A. Well, on August 22nd, Boiler No. 1,—the rolling of boiler tubes was proceeding. The water-wall tubes were received on the 17th of August, and the work of installing these tubes was carried on. The previous work caused some difficulty because of misalignment of the water-wall headers, and we found that if all of the tubes had been on the job at the start this trouble would not have occurred. This matter was reported to the inspector and written into his records. That was Cory-Joslin's inspector. I have a notation that the progress of the [140] work was shown to be about twenty per cent complete at that time.

Mr. Sholz: (Interposing) Apparently this witness is reading from some record.

The Court: Of course, any time that counsel feels that they should be in evidence, I will permit them to be introduced. If there are records, there could be no better evidence.

Mr. Sholz: I think they are self-serving. However, he does have a right to testify as to the delays he alleges he suffered. Whether they can be reimbursed, is another question.

(Testimony of W. Lyle Borst.)

The Court: You may go ahead.

A. On the 13th of September, Boiler No. 1,—the boiler drums and tubes, water-walls were all to have been completed on the 23rd, I believe, and the actual completion date was on the 8th of September. We were short some fifty-seven tubes on this work. The water-wall tubes were requisitioned for August 1st, and were received, the first ones on August 17th, and on boiler No. 2 we found all of the work at a standstill outside of the work on the soot-hoppers, which was completed on the first. This was held up because of the tubes, and on Boiler No. 3 the work had been slowed down to a pace to permit the completion of the drums and headers, in order to be ready for the tubes when they would arrive on August 17th, as scheduled,—

Q. (Interposing): Will you explain what you mean by [141] slowing down, or pacing the work?

A. Well, rather than do the work in absolutely as short a time as possible, we did draw it out and used a lesser number of men, keeping the work in progress rather than using the same number of men and laying them off, so that on this work we more or less gauged it and paced it rather than go ahead rapidly with the work and then lay the men off. There was a delay due to the final cleaning and inspection. At that time we knew that all of the piping work was ahead of schedule and in very good shape,—

Mr. Scholz (Interposing): Are you now talking about those fifty-seven tubes?

(Testimony of W. Lyle Borst.)

A. No; I believe I made a statement that fifty-seven tubes were short, and that I went onto the piping work on September 24th. I believe it was Boiler No. 2 that we had received the water-wall tubes, and these tubes were being installed, and we were working every possible man on that job.

Q. (Mr. Watts, continuing): Commencing as of what date?

A. Immediately after September 20th,—every man we could work on that operation. On the 10th of October on Boiler No. 2 work was held up on account of an error in the water-wall header for that boiler, because,—The Combustion Engineering [142] Company had sent a man and the material necessary to correct this error. This was an error which required the cutting off of the tubes, and installing a nipple on the end of the tubes to increase the size from three inches to three and a half inches, so as to fit in entering a three and a half inch hole in the header, which was made by error. On Boiler No. 3 the boiler tubes were installed except for fifteen tubes short, and the work was delayed in this operation. On the 24th of October Boiler No. 2, the water-wall tubes had been remodeled by the Combustion Engineering Company's man, and the tubes installed, and the hydrostatic test completed on October 25th.

Q. Previously you have described these boiler tubes and these sidewall tubes, or, rather, side water-wall tubes and so forth. I think you testified that they were manufactured by some steel mill and

(Testimony of W. Lyle Borst.)

sent to the Combustion Engineering Company for further fabrication? A. That is right.

Q. Will you describe just what the Combustion Engineering Company did?

A. They cut the tubes to the required length and bent them to the shape required.

Q. As shown here (indicating)?

A. Yes, sir. In addition to that, the Combustion Engineering Company has a patent where they weld a fin the full length [143] of the tube, one on one side and one on the other, and that sticks out a ways, and adds to the breadth of the tube.

Q. Is that so it is more efficient in absorbing the heat? A. Yes, sir.

Q. Is there any other place in the United States where tubes of this type could be bought by the Hercules or by the A.-E.-M., or by anyone else, other than the Combustion Engineering Company?

A. No, sir; that is the only place.

Q. The only place that tubes could have been obtained for this unit that you were erecting?

A. That is right.

Q. Now, Mr. Borst, please identify Exhibit No. 12.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 12, for purposes of identification.)

A. That is a letter to Cory-Joslin & Macnsons, dated August 17th, 1944, from the Power Service Corporation.

(Testimony of W. Lyle Borst.)

Mr. Watts: I offer Exhibit No. 12 in evidence at this time.

The Court: Is there any objection to the introduction of this?

Mr. Scholz: No, your Honor.

The Court: It may be admitted. [144]

(Whereupon Plaintiff's Exhibit No. 12, so marked for identification, was admitted in evidence.)

Mr. Watts: I call upon the defendant to produce the letter of August 15th, 1944, written by Mr. Hagan to the Power Service Corporation, and this letter I hold in my hand now is dated August 17th, 1944, and is signed by Mr. Borst, addressed to Cory, Joslin & Macnsons, care of Lozier, Broderick & Gordon, and is for the attention of Mr. Jung:

"In Re: Completion of Power House No. 1, Lump Sum Contract No. 5, Material Requisition No. 22," and is as follows:

"Gentlemen:

"We hereby confirm the following list of Combustion Engineering Company's material shortages, which was given to Mr. Newbauer of Hercules on August 11th, 1944, by Mr. Elmer Bennett, erector of the Combustion Engineering Company."

and then follows the list of materials.

I now hand the Clerk an exhibit and ask that it be marked 12-A.

Mr. Gibson: And that is from the files of the defendant?

Mr. Watts: That is right.

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing): Will you identify Plaintiff's [145] Exhibit No. 12-A.

(Whereupon document referred to was marked Plaintiff's Exhibit 12-A, for purposes of identification.)

A. That is a letter from Lozier, Broderick & Gordon, signed by Mr. J. S. Hagan, and it is addressed to the Power Service Corporation.

Mr. Watts: I will read this. It is addressed to the Power Service Corporation, and the subject is: "Material shortages."

"Gentlemen:

"Receipt is hereby acknowledged of your requisitions numbered 1 to 13, the latter being dated August 11th, 1944. We assume that the above requisitions represent all of the shortages of material required for completion of your contract on Power House No. 1, and that same are the result of a complete inventory made by you in accordance with Paragraph 5-04 (b) of your contract.

"If the above requisitions do not cover all of the shortages, we should be advised at once of any further material requirements so that the progress of the work will not be delayed. In accordance with the above mentioned paragraph of your contract, a complete inventory was to have been prepared immediately upon starting your work so that shortages could be determined.

"Yours very truly, [146]

Wm. F. Lozier, Inc., Broderick & Gordon."

The Court: Is there any objection?

(Testimony of W. Lyle Borst.)

Mr. Scholz: No objection to this exhibit.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 12-A so marked for identification, was admitted in evidence.)

Mr. Watts: There is a copy indicated to the resident engineer of Cory, Joslin & Macnson, to D. C. Smith, to C. H. Murphy, to the Power Service Corporation.

Q. (Mr. Watts, continuing): Now, will you identify Plaintiff's Exhibit No. 13, for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 13, for purposes of identification.)

A. Yes, sir; that is a letter to Cory, Joslin & Macnsons from the Power Service Corporation, dated on August 19th, 1944.

Mr. Watts: We offer in evidence Plaintiff's Exhibit No. 13, and I might suggest to counsel that a copy of each one of these exhibits now can be found at page 113 of my brief; so they can refer to them.

The Court: Is there any objection to this exhibit?

Mr. Sholz: No objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 13, so marked for identification, was admitted in evidence.) [147]

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing): Now, Mr. Borst, please refer to Plaintiff's Exhibit No. 4 and tell the Court the date on which you addressed your first letter about this tube shortage to Lozier, Broderick & Gordon,—I mean, when you first addressed it to Cory, Joslin & Macnsons regarding the tube shortage?

A. The letter was written on July 26th.

Q. That is the letter which has been introduced in evidence here, and is dated July 26th, 1944. I don't believe I read it at the time, and I will read it now.

Mr. Watts: Mr. Borst has identified it as being a letter dated July 26th. It is addressed to Cory, Joslin & Macnsons and is from the Power Service Corporation, W. Lyle Borst, Chief Engineer.

“Gentlemen:

“In connection with our subcontract for complete erection of boilers in Power House No. 1, Sunflower Ordnance Works, Johnson County, Kansas, we wish to advise of a major shortage of materials which will delay the progress of our work beyond our contract schedule.

“This material consists of water-wall tubes for all three of the boilers which we are to erect. In order for us to complete our work in the one hundred twenty day period required, it will be necessary for us to have delivered to the job sufficient tubes for one boiler by August 1st, 1944; sufficient tubes for a second boiler by August 8th, 1944, and

(Testimony of W. Lyle Borst.)

the balance of the tubes for the third boiler by August 15th, 1944.

Very truly yours, [149]

POWER SERVICE
CORPORATION,

W. LYLE BORST,
Chief Engineer."

Q. (Mr. Watts, continuing): Now, will you please identify Exhibit No. 14?

(Whereupon document referred to was marked Plaintiff's Exhibit 14, for purposes of identification.)

A. That is a letter from Cory, Joslin & Macnsons to W. Lyle Borst, dated on the 19th of August, 1944.

Mr. Watts: We offer in evidence Exhibit No. 14, a letter dated August 19th, 1944, written by Mr. Jung of the Cory-Joslin people, and addressed to W. Lyle Borst. It is as follows:

"I have received your memorandum dated August 18th, advising me of the conditions encountered in installing the water-wall tubes.

"May I suggest that you go on record with a letter stating these facts, addressed to Cory, Joslin & Macnsons, and one copy addressed to Lozier, Broderick & Gordon, attention of Mr. J. S. Hagan,

(Testimony of W. Lyle Borst.)

Chief Engineer, and one copy to the office of the resident engineer, attention of Mr. Ralph H. Downing.

“CORY, JOSLIN & MACNSONS
RALPH J. JUNG.”

There is a copy indicated to Mr. Wedlick.

Q. (Mr. Watts, continuing): Did you comply with this request of the Cory-Joslin people?

A. Yes, sir.

The Court: If this was offered, is there any objection to the admission of it?

Mr. Watts: It was offered.

Mr. Scholz: No objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 14, so marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): I will now ask you to identify Exhibit No. 17.

(Whereupon document referred to was marked Plaintiff's Exhibit 17, for purposes of identification.)

A. That is a letter dated August 29th, 1944, to Cory, Joslin & Macnsons from the Power Service Corporation.

Q. What was the purpose of this letter?

A. To advise them of the defects encountered with respect to the water-wall tubes.

Q. And was that in compliance with Mr. Jung's request? A. Yes, in direct compliance.

(Testimony of W. Lyle Borst.)

Mr. Watts: The letter is from Mr. Borst, and is as follows:

“Gentlemen: [151]

“In accordance with your letter of August 19th in which you request that we formally submit the information contained in our memorandum of August 18th with reference to the progress of our work. The contents of this memorandum is as follows:

Memorandum to Mr. Ralph J. Jung August 18, 1944

Memorandum to Mr. Clyde G. McFadden, Sunflower Ord. Works.

“For your information relative to the progress of our work on Power House No. 1, we wish to advise you of the following conditions encountered. As of this date, and yesterday, we are being delayed on the erection of water-wall tubes on Boiler No. 1. This delay is occasioned by the fact that we endeavored to install every tube possible before the main shipment of tubes arrived on August 16th. Due to the fact that we did not have all of the tubes when work on these walls was started. On August 4th. We were unable to install the necessary tack tubes to obtain proper alignment of the headers as the side-wall tubes and roof tubes were not on the job, as you know. We are now delayed in adjusting for this misalignment with respect to the headers to each other. With respect to the boiler supporting steel and side wall casing steel, and with respect to the boiler proper. [152]

(Testimony of W. Lyle Borst.)

“We are waiting for water-wall tubes for No. 2 boiler at this time, and will be unable to proceed with proper setting of headers on this boiler for fear of encountering similar difficulties as experienced on No. 1 boiler. We find that the right front boiler column leans seven-sixteenths of an inch out at the top, and the lefthand front columns leans three-sixteenths of an inch out at the top. To compensate for these variations in dimensions, we shall require all the tubes for Boiler No. 2 in order to proceed.

“We will be glad to review this matter in detail with you, if you desire.

Yours very truly,

PUBLIC SERVICE
CORPORATION,

W. LYLE BORST.”

The Court: What was the date of that letter?

Mr. Watts: August 29.

Q. (Mr. Watts, continuing): Now, will you identify the document marked Plaintiff's Exhibit No. 17-A?

(Whereupon document referred to was marked Plaintiff's Exhibit 17-A for purposes of identification.)

A. That is a diagram that I have prepared.

Q. Will you take that diagram and explain to the Court what you mean by misalignment to which

(Testimony of W. Lyle Borst.)

you referred in Exhibit No. 17, which was the letter dated August 29th? [153]

A. This is a theoretical diagram showing the diagram of a water-wall system wherein there would be a top and bottom header, with tubes carrying between. The tube head is supported on bolts which have adjustable nuts, which allow the header to be lowered or raised, and which are required in the final installation in putting in a system of this kind. It would be good practice to install the tube at one end and then at the other end to obtain the relationship which should follow between the top and bottom header, and that would take care of any particular difference in dimensions between the ends of the two headers and establish that dimension, and all the intervening would then be installed, and the entire system would be in final adjusted alignment.

Q. What was actually done in this case instead of following the procedure that you have outlined?

A. We had only one or two tubes for this system, which we installed at the ends of the headers, but we were unable to obtain the proper alignment of the headers; however, we did go forward with that much work, thinking that we were gaining ground.

Q. When the balance of the tubes came, tell the Court what situation you found to exist?

A. We found that we had made an error in establishing the alignment of the headers. It was unavoidable, and to correct it, [154] we had to go

(Testimony of W. Lyle Borst.)

back and readjust, and when the tubes were all there, and this took longer than if we had not attempted to do the work.

Q. Did you have to tear out some of the tubes and reinstall them and make the entire header level?

A. In effect, yes, but these tubes were not actually made fast, but a considerable number of points of adjustment between various parts of this system with respect to the boiler steel work and so forth had to be taken care of. We had to re-do the work we had done before.

Q. The net effect was what, as to the increased labor cost?

A. It did increase the labor cost.

Q. To what extent?

A. Well, we had made adjustments in position and alignment of the header to as good a position as we could, and then we had to re-do that again after the tubes were all there.

Q. Is that what you referred to day before yesterday when you referred to doing the work out of sequence?

A. Yes, sir.

Mr. Sholz: May I question the witness?

The Court: Yes; you may.

Mr. Sholz: Were you not paid for any changes that you made?

A. Not work of this kind.

Mr. Watts: We offer in evidence Exhibit No. 17-A.

The Court: Is there any objection?

(Testimony of W. Lyle Borst.)

Mr. Sholz: It is only for illustration, I understand?

Mr. Watts: That is right.

The Court: It may be admitted for that purpose.

(Whereupon Plaintiff's Exhibit 17-A for identification was admitted in evidence.)

Q. (Mr. Watts, continuing): The first letter, or notification of delay, was in July?

A. Yes, sir.

Q. Will you please identify Exhibit marked 14-A, Mr. Borst?

(Whereupon document referred to was marked Plaintiff's Exhibit 14-A for purposes of identification.)

A. That is a letter to the Power Service Corporation from Lozier, Broderick & Gordon, signed by Mr. J. S. Hagan. It is dated August 22nd, 1944.

Mr. Watts: We offer in evidence Exhibit No. 14-A, a letter from Mr. Hagen, and it is as follows:

"Attention W. Lyle Borst, Chief Engineer.

"Subject: Defective boiler tubes.

"Gentlemen:

"We have been advised that in the process of cleaning up boiler tubes for Power House No. 1, building No. 154-1, [156] some defective tubes have **been counted**. It is our understanding that the Hercules Powder Company has placed an order for the number of tubes that have been found defective to date, which would cover your present requirements.

(Testimony of W. Lyle Borst.)

“In order that the number of defective tubes that will be required to be replaced in all three **boilers** can be determined, the remaining tubes that have not been examined at this time should be cleaned up at once so that no delay will ensue. Any delay caused by the number of defective tubes not being determined must be absorbed by the Power Service Corporation.

Yours very truly,

WILLIAM F. LOZIER, INC.,
BRODERICK & GORDON.”

There is a carbon copy indicated to Mr. Wheelock, Resident Engineer, to Mr. F. V. Wedlick, Mr. Neubauer, and of course this letter to the Power Service Corporation.

Q. (Mr. Watts, continuing): Will you identify plaintiff's Exhibit 15, which has been marked.

(Whereupon document referred to was marked Plaintiff's Exhibit 15, for purposes of identification.)

A. That is a letter dated August 22nd, 1944, addressed to Cory, Joslin & Macnsons by the Power Service Corporation, signed by myself. [157]

Mr. Watts: We offer in evidence Plaintiff's Exhibit No. 15, and I will read it:

“Gentlemen:

“We have found that the water-wall headers for the front wall on Boiler No. 2 to have more holes

(Testimony of W. Lyle Borst.)

than they should have. These headers we will not be able to use.

“These headers were erected in approximate location before we came on the job. We would propose to remove these headers and install two headers from Boiler No. 3 so as to enable us to do as much work on No. 2 Boiler as we can. The cost of removing these headers and the installation of headers from No. 3 boiler we feel should be paid for over and above our contract. The time required should also be granted as an extension to our contract. We have also made formal requisition for the new headers to be used on Boiler No. 3.

“Will you kindly review this matter as soon as possible.

Very truly yours.

POWER SERVICE
CORPORATION,
W. LYLE BORST.”

Q. (Mr. Watts, continuing): Will you explain what you mean by header having too many holes in it?

A. Well, it has a system of holes which receive the tubes. The tubes enter into, and fasten to it. Naturally it is manufactured [158] for a specific boiler. In this case this header had been fabricated in error, or for some other unit, and had been shipped out in error, and could not be used, and could not be rebuilt.

(Testimony of W. Lyle Borst.)

Q. Had it been installed in the unit?

A. Yes, it had been hung in the approximate location.

Q. Will you tell the Court when in the usual course of procedure you would be expected to learn that it had too many or too few holes? At what period, or place, in your work?

A. When you get into a job and are dealing with it, you then start to put the tubes in place. Obviously, if the holes were incorrect, it would be visible at that time.

Q. How many holes would these headers have, approximately, running across here (indicating)?

A. Roughly, thirty-five.

Q. You were paid for this additional work?

A. Yes; we were.

Q. Under the modification, or one of the modifications introduced yesterday?

A. Yes, for taking down this header, loading it out, and putting in another.

Q. Before this modification did you get a letter about an extension of time?

A. Yes, sir; we did. [159]

Q. I will ask you to identify Exhibit No. 15-A.

(Whereupon document referred to was marked Plaintiff's Exhibit A, for purposes of identification.)

A. That is a letter to Cory, Joslin & Macnsons from Mr. Hagan, dated August 29th, 1944.

Mr. Scholz: As I understand it, Mr. Borst has testified that he has paid for that work. That tes-

(Testimony of W. Lyle Borst.)

timony was offered for the purpose of showing damage, was it? I move the testimony regarding that be stricken from the record.

The Court: I think it would be material, not as to proving damages for that work, but it would show that in the entire contract there was additional work, and a portion of it was paid for. Your objection is overruled.

Mr. Watts: This letter is signed by Mr. Hagan, and dated August 29th, 1944.

“Subject: Water-wall headers, Power House No. 1.

“We are in receipt of a copy of letter from the Power Service Corporation addressed to you, under date of August 22nd, in which they call your attention to the fact that the water-wall headers for the front wall on Boiler No. 2 have more holes in same than they should have, and that they will be unable to use same.

“It is our understanding that these headers were erected prior to the Power Service Corporation's work [160] on the job. The Hercules Powder Company has issued Work Order No. X-5333 covering the removal and replacement of the defective headers, and the cost of same in the amount of \$114.43 is to be charged back to the Ordnance Department on the above Work Order. The Hercules Powder Company, in turn, will charge back to the Combustion Engineering Company, who is responsible for the defective headers. The Combustion Engineering Company's representative, Mr. Bennett, has

(Testimony of W. Lyle Borst.)

agreed with the Power Service Corporation on the above amount. We will pay the Power Service Corporation the additional amount of \$114.42 on its contract to cover this work.

“We believe that the work is of such a nature that no additional time should be granted for executing same, as the Power Service Corporation has used the headers originally scheduled for Boiler No. 3 on Boiler No. 2, and the new headers, when supplied by the Combusion Engineering Company will be used on Boiler No. 3.

J. S. HAGAN,
Chief Engineer.”

There was a carbon copy sent to C. H. Murphy and L. J. Neubauer. We now offer Exhibit 15-A in evidence.

The Court: Is there any objection?

Mr. Scholz: None.

The Court: It may be admitted. [161]

(Whereupon Plaintiff's Exhibit 15-A for identification was admitted in evidence.)

Mr. Watts: I also offer No. 15 in evidence.

The Court: If it was not admitted before it may be shown now in the record as being admitted.

(Whereupon Plaintiff's Exhibit 15, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Will you please identify Plaintiff's Exhibit No. 22, marked for identification.

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit No. 22, for purposes of identification.)

A. It is a letter dated September 27th, 1944, addressed to Cory, Joslin & Maensons, signed by myself, W. Lyle Borst.

Mr. Watts: We offer Exhibit No. 22 in evidence, and I will read it. It is for the attention of Mr. Wedlick:

“RE: Completion of Power House No. 1, Lump Sum Sub-contract No. 5.

“Gentlemen:

“We wish to advise that there is an error in the fabrication of the two lower side wall water-wall headers as furnished for Boiler No. 2 by Combustion Engineering Company. These headers have been drilled with three and one-half inch holes instead of three inch holes, as required to suit the three inch tubes. [162]

“The matter has been reviewed by the Combustion Engineering Company, and we have been advised verbally that they will take steps to make correction to cure the error. The method which Combustion Engineering Company states they will use will be to provide new short tube sections to weld on the ends of the three inch tubes to increase the diameter up to three and a half inches. This tube could then be rolled into the header, having the three and one-half inch hole. Combustion Engineering Company will send a man to the site to weld on these new tube ends.

(Testimony of W. Lyle Borst.)

“As we were prepared to install these tubes as of September 26, we will experience a delay on this Boiler until these tubes have been made over and ready for installation.

“Combustion Engineering Company say that they will have material and men on the job in about one week to do this work.

“Yours very truly,

POWER SERVICE
CORPORATION,

W. LYLE BORST.”

There was a copy of that letter sent to Lozier, Broderick & Gordon and to Mr. R. H. Downing.

Q. (Mr. Watts, continuing): Will you step down here, Mr. [163] Borst, and describe that error to the Court?

The Court: Have you offered the last exhibit in evidence?

Mr. Watts: I believe I did. If not, I now make the offer.

The Court: Any objection?

Mr. Scholz: No.

The Court: Admitted.

(Whereupon Plaintiff's Exhibit No. 22 for identification was admitted in evidence.)

A. In case of this boiler we would have this situation: This header was found to have holes larger than they should have been to receive the three inch tubes.

(Testimony of W. Lyle Borst.)

Q. What are the size of those tubes?

A. Three inches on the outside diameter.

Q. What is the size of the holes in the header, the correct size?

A. Three and sixteen-hundredths, probably,—just enough to allow the tubes to slide in.

Q. And what size were the holes?

A. Three and one-half inch.

Q. And was it possible to roll the tubes under those conditions? A. No, sir. It was not.

Q. And what was done, Mr. Borst?

A. It was elected to have the tube cut off about a foot away from the end and get a new section welded on, and instead of the portion that was cut away, in place of it, rather, there was a piece that was increased from three inches on one end to three and one-half inches on the other end. This brings it to three and one-half inches on the end we wished to bring into the header.

Q. Was that process followed rather than wait for new tubes? A. Yes, sir.

Q. Did that situation produce any delay in the performance of the contract? A. Yes, sir.

Q. Will you identify, for the record, Exhibit No. 22-A?

(Whereupon document referred to was marked Plaintiff's Exhibit 22-A for purposes of identification.)

A. That is a copy of a telegram from the Combustion Engineering Company. I don't find any date on it. The date does not show.

(Testimony of W. Lyle Borst.)

Mr. Watts: We offer Exhibit 22-A in evidence.

Mr. Scholz: Who is that from?

A. I think from the Combustion Engineering Company, manufacturer of tubes and boilers. [165]

Mr. Scholz: Do you know that, or is it your belief? A. I know. I have seen it.

Mr. Watts: I offer this in evidence.

Mr. Scholz: We object to it as immaterial. I think it just clouds the record, and it is not binding on this defendant.

The Court: I will consider your objection, but I will permit it in the record at this time. I will strike it later if I decide it is immaterial.

(Whereupon Plaintiff's Exhibit 22-A for identification was admitted in evidence.)

Q. (Mr. Watts, continuing): Does this have to do with the [166] matter you have been testifying about? A. Yes, sir; that is right.

Q. Will you identify Exhibit marked 22-B, please?

(Whereupon document referred to was marked Plaintiff's Exhibit 22-B, for purposes of identification.)

A. That is a letter from Mr. J. S. Hagan, Chief Engineer, to Cory, Joslin & Macnsons, for Mr. Wedlick. It is dated September 28th, 1944.

Mr. Watts: We offer Exhibit No. 22-B in evidence and I will read it at this time. It is ad-

(Testimony of W. Lyle Borst.)

dressed to Cory, Joslin, for the attention of Mr. Wedlick:

“Subject: Completion of Power House No. 1, Building No. 154-1, Lump Sum Subcontract No. 5 to Fixed Fee Subcontract No. 5.

“We are in receipt of a copy of letter under date September 27th from the Power Service Corporation, addressed to Cory, Joslin & Macnsons, in which they advised that they will experience a delay in the completion of Boiler No. 2 due to the error in the fabrication of the two lower side wall water-wall headers as furnished by the Combustion Engineering Company. It would appear from the letter that it was written to justify a future claim for an extension of time.

“From information that we have received from our [167] Mr. Neubauer, it would appear that one day's delay has been suffered by the Power Service Corporation. This was on September 26, when the error was discovered by them. We were not notified until September 27 as to how the Combustion Engineering Company had decided to rectify the error. At this time part of the tubes had been rolled into the header, and this operation can proceed on all the tubes except the nine tubes in each header where the error exists.

“The water-wall headers for Boiler No. 3 were unloaded this morning (September 28), so that the Power Service Corporation may proceed in erecting tubes on Boiler No. 3, should there be some delay in receiving the nipples required for them to

(Testimony of W. Lyle Borst.)

place the nine tubes in each of the two headers in Boiler No. 2.

(Signed) "J. S. HAGAN."

There is a carbon copy of this letter sent to C. H. Murphy, L. J. Neubauer, and also to the Power Service Corporation. If I have not already done so, I offer this in evidence at this time.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 22-B, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Now, will you identify No. 23 for the record? [168]

(Whereupon document referred to was marked Plaintiff's Exhibit No. 23, for purposes of identification.)

A. It is a letter from the Power Service Corporation signed by me to Cory, Joslin & Macnsons, Sunflower Ordnance Works. It is dated October 10th.

Mr. Watts: I offer Exhibit No. 23 which is a letter addressed to Cory, Joslin & Macnsons from the Power Service Corporation, and it is as follows:

"Attention: Mr. Frank Wedlick.

"RE: Completion of Power House No. 1, Lump Sum Subcontract No. 5.

"Gentlemen:

"We wish to make certain that you understand the status of our work on Boiler No. 2, which is

(Testimony of W. Lyle Borst.)

delayed because of the error in water-wall headers. All work on the boiler water-walls and boiler tubes was completed as far as possible on September 30, 1944.

“No further work on the boiler proper can be done until the 18 water wall tubes have been installed. This cannot be done until the three and one-half inch to three inch swedge ends have been received and welded on by Combustion Engineering Company.

“We will, of course, be unable to do any major work on the setting until the hydrostatic test has been made on [169] this boiler.

“We are also waiting delivery of the balance of boiler tubes on No. 3 boiler.

Yours very truly,

POWER SERVICE
CORPORATION,

By W. LYLE BORST.”

There is an indication that copy was sent to Lozier, Broderick & Gordon, and to Mr. R. H. Downing, Resident Engineer.

Q. (Mr. Watts, continuing): That letter was written on October 10th? A. Yes.

Q. What was the date that you specified and agreed upon that the tubes on Boiler No. 3 should be delivered?

Mr. Scholz: The best evidence is the writing itself.

(Testimony of W. Lyle Borst.)

Mr. Watts: I introduced it yesterday. I called your attention to that.

The Court: Yes; that is right, and that was exhibit what?

Mr. Watts: That was 51, and showed that these were due on August 15th. A copy of that letter of October 10th was sent to William F. Lozier, Broderick & Gordon, and to Mr. Downing. The one to Broderick & Gordon was for the attention of Mr. J. S. Hagan. [170]

The Court: Do you have any objection to this last exhibit?

Mr. Scholz: No.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 23 so marked for identification was admitted in evidence.)

Q. (Mr. Watts, continuing): Will you now identify Exhibit marked Plaintiff's Exhibit No. 24 for the record, Mr. Borst?

(Whereupon document referred to was marked Plaintiff's Exhibit 24 for purposes of identification.)

A. That is a letter from the Power Service Corporation to Cory, Joslin & Macnsons.

Mr. Watts: We offer exhibit No. 24. It is a letter dated October 14th, 1944, signed by Mr. Borst, and addressed to Cory, Joslin, for the attention,—addressed to Cory, Joslin, Desoto, Kansas, for the attention of Mr. Wedlick, and the subject is:

(Testimony of W. Lyle Borst.)

“Completion of Power House No. 1 Lump Sum
Subcontract No. 5.”

and is as follows:

“Gentlemen:

“We wish to advise that we have today received the swadged reducers for the water-wall on No. 2 boiler. There were no chill rings received with these [171] reducers, so that we will not be able to go forward with the work of revamping the water-wall tubes. Mr. Bennett of Combustion Engineering Company has reported this shortage to his Chicago office with a view of having them sent out by air express.

“Yours truly,

POWER SERVICE
CORPORATION,

By W. LYLE BORST.”

and there is a copy of that letter to William S. Lozier, Broderick & Gordon, for the attention of Mr. Hagen, and a copy to the resident engineer, attention Mr. R. H. Downing. We offer the exhibit at this time.

The Court: Any objection?

Mr. Scholz: No.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 24, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Will you identify Exhibit No. 25,—Plaintiff's No. 25, for the record?

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit No. 25, for purposes of identification.)

A. That is a letter dated November 10th, addressed to Cory, Joslin & Macnsons from the Power Service Corporation.

Q. What is the significance of November 10th?

A. That was the end of the one hundred twenty day [172] period.

Mr. Watts: This is a letter, as the witness said, addressed to Cory, Joslin & Macnsons, dated November 10th, for the attention of Mr. F. V. Wedlick. The subject is:

"Completion of Power House No. 1,"
and the letter reads:

"Gentlemen:

"With reference to our contract for completion of Power House No. 1. We wish to advise that we shall be unable to complete our work in the one hundred twenty day period provided for in our contract. This time elapsed on November 10th.

"The delay in our completion is due in part to delay of shipment of water-wall tubes, which were not on the job when we began work. We were also delayed because of water-wall headers which had to be furnished new in view of an error by others in fabrication of the original headers furnished.

"More specifically, these delays may be analyzed as follows. (Reference to required dates. Refer to our original completion schedule.)

(Testimony of W. Lyle Borst.)

“Boiler No. 1:

“Water-wall tubes required August 1st. Water-wall tubes received August 17th. Water-wall tubes 16 days late.

“Boiler No. 2:

“Water-wall tubes required August 8th. Water-wall tubes received September 20th. Water-wall tubes 43 days late.

“Boiler No. 3:

“Water-wall tubes required August 15th. Water-wall tubes received September 20th. Water-wall tubes 36 days late. Water-wall headers required at start of job, August 15th latest. Water-wall headers received September 26th. Water-wall headers 41 days late.

“A delay was also occasioned by the fact that certain other water-wall headers on Boiler No. 2 were fabricated in error and necessitated a modification of the tubes which connect to the header. Work was held up on this boiler from September 30th until October 18th.

“From the above it is apparent that the progress of our work has been delayed through factors beyond our control. We, therefore, request an extension of our contract completion date to December 15th.

“In making this request for additional time of completion we do not waive any rights which we have claimed for additional compensation to such delay. These claims would be accordance with the

(Testimony of W. Lyle Borst.)

paragraph [174] appended to the contract which provides for such claims.

Yours very truly,

POWER SERVICE
CORPORATION,

W. LYLE BORST,
Chief Engineer."

There is a copy of that letter to J. S. Hagan, and also to Mr. R. H. Downing.

The Court: Do you have any objection to this exhibit, Mr. Scholz?

Mr. Scholz: None.

The Court: It may be admitted.

(Whereupon, Plaintiff's Exhibit 25, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Mr. Borst, I wish you would take the progress schedules introduced in evidence, and also refresh your recollection from your records, and tell the Court what delays you experienced in the performance of this contract, and demonstrate those delays by reference to your progress schedule as you make your explanation.

Mr. Scholz: Is that Exhibit No. 51 that you referred to? [175]

Mr. Watts: From 51 to 64, inclusive.

A. In summarizing the delays at the time we made it clear,—we noted that the water-wall tubes had been required as of August 1st for Boiler No. 1, which was the date shown on the progress chart,

(Testimony of W. Lyle Borst.)

which is Exhibit No. 51. It was shown the date on which the water-wall tubes would have been required for Boiler No. 1, which was August 1st. In this memoranda we show,——

The Court: What exhibit is that?

Mr. Scholz: That is your interpretation is it not, Mr. Borst?

A. Yes.

Mr. Scholz: Your interpretation of the Progress schedule?

Mr. Gibson: These schedules show, or, rather this schedule shows when they started a certain unit of work, and it shows between certain times that they proposed to do so much work within so many days.

The Court: Does the schedule show anything in addition to that?

A. These exact items, the water-wall tubes for Boiler No. 1, Boiler No. 2 and Boiler No. 3, that is the particular item I am dealing with here,——

Q. (Mr. Watts, interposing): In other words, Mr. Borst, [176] the water-wall tubes could not be installed unless they were on the job?

The Court: This exhibit does not show that. It only shows that the tubes were required on a certain date.

Mr. Gibson: The proposed progress. This shows that they proposed to do a certain job. It doesn't mean that the tubes were there, or were not there.

Mr. Scholz: The schedule shows the number of

(Testimony of W. Lyle Borst.)

days that will be required to do a certain amount of work.

The Court: Is that correct?

A. This schedule shows the number of days in which that was to have been completed.

Mr. Scholz: It shows the number of days that was proposed by you?

A. Yes, sir.

Q. (Mr. Watts, continuing): Was the work commenced? A. Yes, sir.

Mr. Scholz: This is merely your proposed schedule showing that a number of days would be required to do a certain unit of work?

A. Yes, sir.

The Court: That is, according to your judgment?

A. Yes, sir.

Q. (Mr. Watts, continuing): Was this agreed upon by [177] the A.-E.-M., the Government and the defendant?

A. Yes, sir. This was the logical reasonable time needed that was agreed upon.

Q. And what was the date upon which you proposed to commence the installation of the tubes for Boiler No. 1?

A. It shows August 1st as being the date, this is August 1st, this line here (indicating).

Mr. Scholz: These little squares are days?

A. That is right.

The Court: In other words, that is the proposed plan of operation?

(Testimony of W. Lyle Borst.)

Mr. Watts: That is the agreed plan.

The Court: It is a plan of operation?

A. Yes, sir.

Mr. Scholz: As I understand you, you submitted this progress schedule and it shows a number of days to do a certain unit of work. You submitted that to the defendant, and you testified that he approved of this progress schedule?

A. That is right.

Q. (Mr. Watts, continuing): According to this progress schedule, on what date was it necessary to have the water-wall tubes for Boiler No. 1 on the site in order to commence the installation in accordance with the progress schedule agreed upon?

A. For Boiler No. 1, it would be August 1st; for Boiler No. 2, August 8th; for Boiler No. 3, August 15th.

Mr. Scholz: That is, providing you were ready to proceed yourself, and the materials were there?

A. Yes, sir.

Q. (Mr. Watts, continuing): Were you ready to install the tubes on August 1st?

A. Yes, sir.

Q. In Boiler No. 1? A. Yes, sir.

Q. Were you ready to install the tubes on Boiler No. 2 on August 8th? A. Yes, sir.

Q. Were you ready to install the water-wall tubes on Boiler No. 3 on August 15th?

A. Yes, sir.

Q. Were they present on the site and ready for installation,—ready for your company to install?

(Testimony of W. Lyle Borst.)

A. No, sir.

Q. When were the tubes for Boiler No. 1 actually furnished? A. On August 17th.

Q. When were the tubes for Boiler No. 2 actually furnished? [179] A. September 20th.

Q. How many days late were they in furnishing the tubes on Boiler No. 1?

A. Sixteen days.

Mr. Gibson: I think this objection should be made to the statement that they should be there; they are predicated on orders from this plaintiff in order to get these tubes on the site, and there is nothing to show that he made any such until the last of August.

The Court: I have in mind the other exhibits. In other words, the progress chart would show only the thought of the contractor. This would have to be along with other testimony and the terms of the contract. Now, this witness might testify with that in mind.

Q. (Mr. Watts, continuing): When were the tubes due for Boiler No. 3?

A. August 15th.

Q. When were they furnished?

A. September 20th.

Q. How many days late were the tubes for Boiler No. 3 furnished? A. Thirty-six days.

Q. When were the headers required?

A. The headers on Boiler No. 3 were required on the [180] start of the job, or August 15th, at the latest.

(Testimony of W. Lyle Borst.)

Mr. Scholz: You say "required,"—now, this was taken in connection with everything else, the contract and the other evidence?

Mr. Gibson: The question presupposes an order, and there is no testimony of any order given.

The Court: In Exhibit 17, I think,—no, perhaps it was Exhibit 4 there was notice.

Mr. Gibson: There was a letter that there was a shortage of tubes.

The Court: They are placing this in evidence to show the difference in the furnishing of this material, and by that the difference in the construction chart.

Mr. Watts: I have a deposition subsequently to be introduced which will show that these boiler,—the boiler tubes were already on order by the Hercules Company prior to July 10th, prior to the time the contract was awarded. These tubes were all ordered, and he put them on notice that they would require them. They had already been ordered.

The Court: I think I understand both counsel. You may proceed.

Q. (Mr. Watts, continuing): Tell the Court when, according to the progress schedule, the headers must be present in [181] order for you to follow the progress schedule agreed to by the defendants?

A. The headers were to be there on August 15th, and they were received on September 26th, which was forty-one days later.

Q. Now, you may take your seat again. Tell

(Testimony of W. Lyle Borst.)

the Court what type and by whom,—strike that, please, Mr. Reporter. Tell the Court by what type of inspection were you inspected, and by whom, and when, in connection with the erection of these units?

A. Day to day inspection, carried on by Cory, Joslin, and in addition to that the Area Engineer had in his office a progress scheduling engineer who visited the job nearly every day. Mr. Neubauer was on the job continuously as resident engineer, and he inspected them. At the time when the equipment was placed under hydrostatic we had the service of the Hartford Steam Boiler Company, who also inspected.

Q. Tell the Court whether you had any criticism in writing, or verbal, by representatives of the defendant from the beginning to the end of performance with respect to the time when you requisitioned the material? A. No, sir.

Q. Was there ever any criticism, verbal, or in writing, from any representative of the defendants throughout the performance of the contract with respect to your performance [182] so far as delay is concerned? A. No, sir.

Q. Was there any criticism, either verbal or in writing, by any representative of the A.-E.-M., with respect to the time when you requisitioned this material?

A. Mr. Hagan wrote once or twice inquiring about the requisitions.

(Testimony of W. Lyle Borst.)

Q. Have these letters been introduced during the trial? A. Yes, sir; I think so.

Q. Was there ever any other criticism other than those letters with respect to the time these requisitions were made? A. No, sir.

Q. Has there ever been any criticism, either verbal or in writing, with respect to the delay in the performance of your contract?

A. No, sir.

Q. Has there ever been any criticism, either verbal or in writing, to you, or your company from the Contracting Officer about the time you requisitioned the material? A. No, sir.

Q. Has there ever been any criticism, either verbal or in writing, with respect to any delays in the performance by your organization? [183]

A. No, sir.

Q. On the contrary, will you tell the Court what words were used by the Contracting Officer, or his representative, or the defendants' representative, Mr. Wedlick, about your conduct on this job?

A. Mr. Fegels, our president, visited the project and talked to the Area Engineer about the contract. Mr. Matthews told Mr. Fegels that our work was satisfactory. Mr. Hagan told Mr. Fegels that Borst and his work is satisfactory, and Mr. Wedlick told Mr. Fegels that our work was good, that it was satisfactory.

Q. Have you had any complaints, either about the time you requisitioned this material, or about

(Testimony of W. Lyle Borst.)

the performance, since the completion of the contract by a representative of Cory, Joslin, or the A.-E.-M., or any contracting officer?

A. No, sir.

Q. Did you put on as many men as it was possible to use when the material arrived on the site for the purpose of expediting this contract?

A. Yes, sir.

Q. Did you work overtime? A. Yes, sir.

Q. Have you made a computation in the last two days of the overtime that the supervisory personnel worked between [184] November 10th and December 19th?

A. We have established the total cost of the payroll for that period for those men.

Q. How many men were employed as a part of your supervisory personnel between November 10th and December 19th,—how many men?

A. Eleven men.

Q. Will you tell the Court, Mr. Borst, what was the regular weekly wage in totals without any Sunday or overtime for those men for the period from November 10th to December 19th, without any overtime?

A. Without any overtime, on a base week, \$8,267.53.

Q. I said without any overtime?

A. \$4,278.83.

Q. Will you tell the Court what you actually paid these same men, including overtime?

(Testimony of W. Lyle Borst.)

A. \$7,163.83.

Q. In other words, your overtime for that period, the thirty-nine days, almost doubled your normal payroll for these eleven men?

A. That is correct.

Q. Have you made any claim for that additional cost in connection with this claim, so far as the overtime is concerned? A. No.

Mr. Gibson: May I have a notation as to the exhibit, Mr. Watts?

Mr. Watts: It Exhibit No. 65, a copy of which is attached to the brief at page 137, to page 141.

Mr. Gibson: Has it been offered as an exhibit?

Mr. Watts: No, but it will be.

Q. (Mr. Watts, continuing): Will you tell the Court whether or not these delays to which you have testified are or are not reasonable, in your opinion?

A. The delays to which we have testified are accountable by virtue of delays,—

Q. (Interposing): Are they reasonable,—put it this way: Did the defendant furnish the materials here within a reasonable time in accordance with the progress schedules agreed upon?

Mr. Gibson: That is objected to as incompetent, irrelevant and immaterial,—whether the material was furnished within the time specified in the contract, that is the question.

Mr. Watts: The schedule is required by the con-

(Testimony of W. Lyle Borst.)

tract, and I must prove that the delays were unreasonable.

The Court: I don't think it is material to prove or disprove any issue here, but he may answer.

A. The delivery of the material was not made in time [186] reasonable to the progress schedule.

Q. Give me one illustration of what you mean by that, Mr. Borst.

A. Particularly the tubes,—the water-wall tubes which were required for the No. 3 boiler on August 15th.

Q. How many days was that out of the one hundred twenty day period that the tubes were required?

A. That date of August 15th was some thirty-two days after the commencement of the work.

Q. To be perfectly correct, wasn't it thirty-three days?

A. All right, thirty-three days, and then delivery actually was made, I believe, thirty-nine days after that; so that the actual time between the starting of the work and the time we actually got those tubes was the sum of thirty-three plus thirty-nine days.

Q. Which would be a total of how many days?

A. Seventy-two days.

Q. Which would leave you how many days out of the hundred and twenty to complete the contract after you received the tubes?

A. Forty-nine days.

(Testimony of W. Lyle Borst.)

Q. And,—

Mr. Scholz: It is agreed that my objection goes to all the testimony of this kind that is offered and accepted? [187]

The Court: The question of the unreasonableness of this delay would not be material as far as proving the damages. The question would be when he was ready, and how much he was delayed, not when he got the material. I will admit the testimony, however, but with that thought in mind.

Mr. Watts: In my brief, I have cases which hold that I must establish that the delays were unreasonable. If I don't, then I cannot recover, and the only way I can establish it is by testimony.

The Court: The thought I have is that it would not make any difference, unless they were ready to go ahead with the work.

Mr. Gibson: Plus the fact that the delay was a breach by the defendant. The question is whether the remaining forty-nine days was a reasonable time to complete that unit.

A. It was not a reasonable time.

Q. (Mr. Watts, continuing): What was a reasonable time for you to have in which to erect those units? A. About eighty-eight days.

Q. Were you ready, able and willing to proceed with the erection of this unit eighty-eight days before the termination of the contract?

Mr. Scholz: We object to that as calling for a [188] conclusion of the witness.

(Testimony of W. Lyle Borst.)

The Court: He may answer.

A. Yes, sir; we were ready.

Q. (Mr. Watts, continuing): Tell the Court whether or not, if it had not been for those delays, that you were ready, willing and could have completed this contract within the one hundred and twenty day period from the date you commenced?

A. Yes, sir; we were.

Q. The actual date for the completion of the contract was what? A. December 19, 1944.

Q. The date that you were supposed to complete was what, Mr. Borst?

A. November 10th.

Q. Does the date that you completed appear on Exhibit No. 64, the construction schedule?

A. Yes, sir; I think it does.

Q. Point out to the Court the condition of the progress schedule as of December 19th.

A. The date set up had been November 10th as being the desired date, or the one hundred and twenty days. I will repeat this: The curve,—the original curve lettered "A" shows the date for the desired completion by November 10th; [189] the date on which completion was carried out, being curve "B", is December 19th.

Q. Now, Mr. Borst, have you been paid the full contract price as modified?

A. Yes, sir; we have.

Q. I hand you Exhibit No. 46, will you state what it is?

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit No. 46, for purposes of identification.)

A. It is a letter from Cory, Joslin to the Power Service Corporation dated March 18th, 1946.

Mr. Watts: We offer Exhibit No. 46 in evidence. It is a receipt dated March 18th, 1946, signed by the Power Service Corporation, directed to Cory, Joslin, and it recites: "Power Service Corporation, 711, Wesley Temple Building, Minneapolis, Minnesota. Final Payment on Subcontract F. F. No. 5 to Government Contract No. W-461-Eng-10274, \$1,000.00.

"Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

POWER SERVICE CORP.,

/s/ P. C. GAFFNEY,
Treasurer."

and it has the seal of the corporation. [190]

The Court: Is there any objection to that exhibit?

Mr. Scholz: No.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 46, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) I want you to tell the Court about the claim for damages that you submitted after the termination of the contract.

(Testimony of W. Lyle Borst.)

What period of time elapsed between the time when the job was completed and the time when the claim for damages was submitted first?

A. Something about sixty days.

Q. Can you give the exact date?

A. The completed date was December 19th, and I think the first claim was on February 24th. That was roughly the date.

Q. Will you tell the Court now in connection with the factors that you took into consideration in preparing this claim—tell the court whether the war was still on.

A. It was.

Q. And what type of construction was it possible for companies of your type of company to get, or obtain?

Mr. Scholz: We object to that as immaterial.

Q. Mr. Watts: The explanation of the question is this: [191] Plaintiff originally submitted a claim to the defendant for \$9,323.02. Later that was amended, or changed, to \$10,008.70. At the present time in this action we are asking for \$34,343.00 in damages. I want to demonstrate to the Court exactly what factors entered into the amount of the claim originally submitted, and the factors that enter into the determination of damages according to the law.

Mr. Gibson: The claims speak for themselves. They indicate what are in each one of them.

The Court: I think that is correct. However, I am going to admit this in connection with the

(Testimony of W. Lyle Borst.)

additional claim you filed in this Court, with the understanding that I am admitting it with the receipt and settlement in mind. If the Court later determines that you are bound by the settlement under this receipt, then this testimony would be stricken and not considered by the Court.

Mr. Watts: That is right.

The Court: With the thought in mind, this is my question: Whether you are entitled to make settlement, or, rather after making settlement to make any addition to the claim. I will admit your testimony subject to its being stricken when the Court passes on that question.

Mr. Gibson: And we have an objection that it is [192] incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: Yes. And it will be understood, also, so that Counsel will not be waiving any rights, that there is a motion to strike made at this time. Is that satisfactory?

Mr. Gibson: Yes, it is, your Honor. And the motion to strike is presumably in the record, and the Court is reserving judgment on it?

The Court: That is right. It gives the Court more time to rule. You may proceed now.

Q. (Mr. Watts, continuing:) The war was on?

A. Yes.

Q. What source was open to your organization for contract work during the period of the war?

A. The contracts primarily were war projects.

(Testimony of W. Lyle Borst.)

Q. Did you during this period have any negotiations—any other contracts with the Government?

A. Yes, sir; we had them in a general way under discussion.

Q. Tell what they were.

Mr. Scholz: I don't understand the purpose of this.

Mr. Watts: The purpose is simply this: I want [193] your Honor to put himself in the position of this plaintiff when they set down to figure the original claim, and unless you know the situation they were surrounded with then, you cannot pass upon whether or not that did constitute a waiver, that is, what they did at that time constituted a waiver.

Mr. Scholz: What they did was in their own mind. We are guided by the claim they did submit. What they discussed cannot be binding upon the defendant in this action. The ultimate fact is they submitted a claim. What they thought would not be binding on this defendant.

The Court: I think you are right, but under the former ruling that all of the testimony will be stricken holds that they cannot go beyond that claim, he may answer.

A. Major Matthews here at the Sunflower had a project in mind that he was inquiring whether he would be interested in bidding on.

Q. The contract involved how much?

A. From two to three hundred thousand dollars.

(Testimony of W. Lyle Borst.)

Q. What other contract were you negotiating for with the Government?

A. A power plant at the Gopher Ordnance at Rosemont, Minnesota.

Q. Did you discuss this with Major Matthews?

A. Yes, sir. [194]

Mr. Gibson: That would not be binding upon the defendant here. There is no privity between Matthews and the defendant.

Mr. Watts: We concede that, but there is a reimbursible feature, and the real party is the plaintiff and the Government.

Mr. Gibson: Why didn't you sue them?

The Court: That is immaterial at this time, gentlemen. This contract is between the plaintiff and the defendant. Now, this should not influence, and would not influence the Court. If the case were being tried before the jury, it might have some influence, but I can assure you it does not influence the Court in any way.

Q. (Mr. Watts, continuing:) Mr. Borst, will you please identify the document marked Exhibit No. 29, for the record.

(Whereupon the document referred to was marked Plaintiff's Exhibit 29, for purposes of identification.)

A. That is a letter addressed to Cory, Joslin & Macnsons from the Power Service Corporation. It is dated [195] February 21st, 1945.

Mr. Watts: I offer in evidence Plaintiff's Ex-

(Testimony of W. Lyle Borst.)

hibit No. 29, which the witness has identified as a letter dated February 21st, 1945, to Cory, Joslin & Macnsons, Kansas City, Missouri, and it is as follows:

“Gentlemen:

“We wish to place before you, for your consideration, our claim for additional compensation in connection with our L. S. Contract No. 5 to F. F. Construction Subcontract No. 5, Principal Contract No. W-461-Eng-10274, dated July 11th, 1944.

“We make this claim for additional compensation on the basis of the fact that major and important materials were not on the job when required. Because of this delay in receiving these materials we were unable to make the progress which we would otherwise have been able to make.

“We refer particularly to the water-wall tubes for all three boilers, which were not on the job when work began. Also we refer to water-wall headers which were furnished in error, and for which entirely new headers had to be furnished.

“The importance of having these tubes and headers on the job as required is very vital. The erection of [196] a steam generating unit is a type of work which must be done with a very definite sequence, and the installation of the water-wall tubes and headers comes very early in the order of work. These headers and tubes must be installed and rolled in before the boiler can be given a hydrostatic test. The boiler must be tested before

(Testimony of W. Lyle Borst.)

any real amount of brickwork, insulation and casing can be installed. This work must be complete before instruments, piping, combustion control miscellaneous boiler trim can be installed.

“The delays on these headers and tubes are as outlined below. The dates given as required dates are as provided in our original completion schedule.

“Boiler No. 1:

“Water-wall tubes required August 1st. Water wall tubes received August 17th. Water-wall tubes 16 days late.

“Boiler No. 2:

“Water-wall tubes required August 8th. Water wall tubes received September 20th. Water-wall tubes 43 days late.

“Boiler No. 3:

“Water-wall tubes required August 15th. Water-wall tubes received September 20th. Water-wall tubes 36 days late. Water-wall headers required at start of [197] Job—August 15th latest. Water-wall headers received September 26th. Water-wall headers 41 days late.

“A further delay was experienced because of the fact that a further error was made by the Boiler Company in fabricating water-wall header for No. 2 boiler. This header was made with holes for three and one-half inch tubes instead of three inch tubes. In order to overcome this situation the tubes were cut off and new stub ends supplied and welded on. These stub ends being three inch

(Testimony of W. Lyle Borst.)

on one end, and three and one-half inch on the other which accomplished a connection that otherwise could not have been made without an entirely new header. Work on this boiler was held up from September 30th until October 18th because of this difficulty.

“We were also delayed because of boiler tubes for Boiler No. 3, which were found to be defective and had to be replaced.

“We make the claim for additional compensation to cover our costs of four weeks additional time required by us over the time which would have been required had the materials been on the job as needed. During these four weeks our general overhead expenses for supervision and for rental of equipment were as follows: [198]

“Supervision:

“W. Lyle Borst, Chief Engineer, \$400.00; expense \$150.00.

Emil Nelson, General Superintendent, \$400.00; expense, \$150.00.

O. C. Thorndsen, Piping Superintendent, \$673.00; expense \$150.00.

James A. Hobbs, Boilermaker Superintendent, \$676.00.

Ray B. Shaw, Purchasing Agent, \$400.00.

E. W. Ross, Chief Clerk, \$477.82; expense \$150.

James P. Krutzer, Senior Clerk, \$325.00.

Jack L. Wright, Junior Clerk, \$241.50.

(Testimony of W. Lyle Borst.)

Harvey Precht, General Boilermaker Foreman,
\$680.16.

Fred M. Goodsoe, General Piping Foreman,
\$596.60.

Rhea F. Moor, Material Control, \$484.69.

Clifford S. Boyle, General Millwright Foreman,
\$531.71.

Total—\$6,486.48.”

Then follows a subheading of “Equipment Rental,” and under that is itemized all of the rental equipment, naming each piece specified and the rate per month, and the total rental is extended, the total being \$1,989.00. Then is listed the profit amounting to \$847.54, which makes a total [199] of all of those items of \$9,323.02. And now I will read the balance of the letter:

“We wish to point out that we have not asked for any compensation for reduced efficiency in prosecuting this work. This reduction in efficiency was a very real thing, as we were unable to effect economies possible when one operation can be repeated without interruption by the same crew of men. This, of course, was not possible when the material was not on hand as required.

“We therefore ask that we be compensated only for the direct costs given herein in the amount of \$9,323.02 for the delays suffered on this work.

Yours very truly,

POWER SERVICE CORP.,
By W. LYLE BORST,
Chief Engineer.”

(Testimony of W. Lyle Borst.)

A carbon copy having been sent to Major James E. Matthews, Area Engineer, C. Howard Murphy of Lozier, Broderick & Gordon; J. S. Hagan of Lozier, Broderick & Gordon.

The Court: Is there any objection to the admission of this exhibit?

Mr. Scholz: No; except that it is claiming additional compensation under the contract.

Mr. Watts: No, sir; it is for breach of contract—[200] not additional compensation.

Mr. Scholz: It says that it is for additional compensation. The statement by counsel is not binding upon the Court or upon us.

The Court: It only goes to the question that at least they had asked for it.

Q. (Mr. Watts, continuing:) Now, Mr. Borst, what were the two items outside of profit for which you claimed direct expenses?

A. Some time for supervisory staff, and the equipment used on the job.

Q. Had you ever had any experience before in computing a claim for damages for breach of contract?

Mr. Scholz: That is objected to as incompetent, irrelevant and immaterial. The claim speaks for itself, and any attempt for any excess, or to make a larger claim, is not relevant here.

The Court: It may be admitted subject to your objection.

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing:) Had you had any experience?

A. No; this was my first experience.

Q. You are not a lawyer? A. No, sir.

Q. Have you ever studied law? [201]

A. No, sir.

Mr. Scholz: I shall object to that as incompetent, irrelevant and immaterial. I will say that sometimes these people are better lawyers than those they employ.

The Court: At least he says he is not a lawyer.

Q. (Mr. Watts, continuing:) Did you ever—strike that, please. Did you get a reply to this letter of February 21st, 1945?

A. As I remember, we did—yes, we got a request for further information.

Q. I now hand you exhibit marked Plaintiff's Exhibit No. 31, and ask you to identify that for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 31, for purposes of identification.)

A. That is a letter from Cory, Joslin & Macnsons addressed to the Power Service Corporation dated March 3, 1945.

The Court: Do you have any objection to this?

Mr. Scholz: No objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 31 for identification, was admitted in evidence.)

(Testimony of W. Lyle Borst.)

Mr. Watts: It is a letter addressed to the Power Service Corporation signed "Cory, Joslin & Macnsons, by Karl V. Vasicek, Project Manager," for Cory, Joslin & Macnson, the defendant, and it is addressed to Mr. Borst, that is, [202] called to the attention of Mr. Borst.

Q. (Mr. Watts, continuing:) Will you tell what happened so far as Mr. Wedlick is concerned as project manager?

A. Mr. Vasicek took his place as project manager.

Q. And was Mr. Wedlick on the job?

A. Not any longer, no, sir.

Q. This was after the completion of the contract, was it not? A. Yes, sir.

Mr. Watts: This letter reads as follows:

"Gentlemen:

"We wish to acknowledge your letter of February 21st, 1945, in regard to your claim for additional compensation in connection with Subcontract No. 5 to Lump Sum Contract No. 5.

"Before your claim can receive serious consideration it will be necessary for you to establish definite facts in connection therewith, some of which are as follows:

"1. The necessity of the large overhead as presented in the letter.

"2. Proof of ownership on all of the equipment mentioned.

(Testimony of W. Lyle Borst.)

“3. Necessity for retaining each and every piece of said equipment. [203]

“4. Certified receipts on the rental of this equipment.

You must realize that in order for Cory, Joslin & Macnsons to review a claim such as yours each and every fact has to be justified so that a recommendation may be made to the Area Engineer.

Very truly yours,

CORY, JOSLIN & MACNSONS,
By KARL V. VASICEK,
Project Manager.”

There was a carbon copy sent to Major J. E. Matthews; J. S. Hagan, and C. H. Murphy, and T. A. Dergance.

Q. (Mr. Watts, continuing:) What did you do after the receipt of this letter from the defendant dated March 3rd, 1945, Mr. Borst?

A. We prepared some supporting data.

Q. Did you write a letter subsequent to that date to the defendant with respect to this letter, in response to it?

A. I am sure that we answered the letter.

Q. Handing you what has been marked as Plaintiff's Exhibit No. 32 (1), will you identify that for the record, Mr. Borst?

(Whereupon document referred to was marked Plaintiff's Exhibit 32 (1) for purposes of identification.) [204]

(Testimony of W. Lyle Borst.)

A. It is a letter to Cory, Joslin & Macnsons from the Power Service Corporation dated March 19, 1945.

Q. Will you state whether or not you included a certificate from Fegels with respect to the rental of certain equipment? A. Yes, sir.

Q. Now, will you identify for the record exhibit which has been marked Plaintiff's Exhibit 32 (2) at this time.

(Whereupon document referred to was marked Plaintiff's Exhibit 32 (2) for purposes of identification.)

A. This was the list of equipment which had been brought to the job from the Fegels Construction Company.

Q. Now, identify exhibit 32 (2) for the record, Mr. Borst.

(Whereupon document referred to was marked Plaintiff's Exhibit 32 (2) for purpose of identification.)

A. That is a letter—that is what I meant, a letter from the Fegels Construction Company.

Q. Well, that is right. Will you identify No. 32 (3) for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit 32 (3) for purposes of identification.)

A. That is a tabulation for the record giving its reason for use, and a statement of ownership.

Q. Attached to exhibit 32, give an outline of

(Testimony of W. Lyle Borst.)

each [205] exhibit that is attached thereto, and made a part of this reply to the letter of the defendant asking for additional information.

A. There are supporting letters and invoices from the various suppliers who furnished this equipment.

Q. What is the first?

A. The first is a statement of rental charges to the Power Service Corporation from E. T. Bennett, Lawrence, Kansas.

Q. And the next is what, Mr. Borst?

A. The next is a letter from English Brothers Machinery Company, Kansas City, Missouri.

Q. Is it a letter, or an invoice?

A. It is an invoice.

Q. And the next one is what?

A. An invoice from the Faeth Company, Kansas City, Missouri.

Q. And the next?

A. The next is from English Brothers Machinery Company of Kansas City, Missouri, and there is another from the same company, and then the next one is from the Faeth Company of Kansas City, Missouri, and the next is from the Gopher Equipment Company of Minneapolis, Minnesota. There is another from the English Brothers Machinery Company from Kansas City, Missouri; the next one is from S. D. Callaway Company of Kansas City, [206] Missouri. Do you want me to go through all of these?

(Testimony of W. Lyle Borst.)

Q. Yes; just state who they are from.

A. Well, here is one from Richards & Conover Hardware Company, Kansas City, Missouri; another from Grinnell Company, Minneapolis, Minnesota and St. Paul, Minnesota. The next one from the Minneapolis Iron Store, Minneapolis, Minnesota; the next one from the Victor L. Phillips Company, Kansas City, Missouri; another from the Victor L. Phillips Company of Kansas City, and the next one is from the same company; the next one is from the same company; and the next one is from the same company, that is, the Victor L. Phillips Company. The next one is from the Victor L. Phillips Company; the next one is from the Puritan Compressed Gas Corporation, Kansas City, Missouri; the next one from the Libby Welding Company, Kansas City, Missouri; the next is from the Libby Welding Company, Kansas City, Missouri; the next one is from Luthy Brothers, Incorporated, Kansas City, Missouri. The next one is from the same company, the Luthy Brothers. The next is from the Luthy Brothers, and the next one is from the Fegels Construction Company, Limited, Minneapolis.

Mr. Watts: Now, then the Plaintiff offers in evidence Exhibits 32 (1), 32 (2), and 32 (3).

The Court: Is there any objection?

Mr. Scholz: No objection. [207]

The Court: They may be all admitted.

(Whereupon Plaintiff's Exhibit 32 (1), 32

(Testimony of W. Lyle Borst.)

(2), and 32 (3), for identification admitted in evidence.)

Mr. Watts: Exhibit No. 32 (1) being a letter signed by W. Lyle Borst, addressed to the defendants in this case, and dated March 19th, 1945, reads:

“Gentlemen:

“We have your letter of March 3rd requesting further information regarding our claim for additional compensation in connection with our Subcontract No. 5 to Lump Sum Contract No. 5.

“In answer to the additional information which you request we will offer in the order requested.

“1. The necessity of the large overhead as presented in the letter.

“We have asked for payment on only the exact men whom we employed on this work continuously in supervisory and general overhead capacity. These men made up the minimum organization which could have been used in view of the large variety of work handled, and the trade unions' requirements. Basically, we employed five trades on this project, viz: Boilermakers; steamfitters; millwrights; brickmasons and pipe coverers. The last two mentioned were handled [208] by subcontracts. The boilermakers and the steamfitters both required a superintendent and foreman, while the millwrights required a foreman only. Obviously this organization could have supervised a larger number of workmen at one time so as to have com-

(Testimony of W. Lyle Borst.)

pleted the works sooner, had the materials been on hand as required. The other men, such as time-keepers, clerks, purchasing agents, etc., were all essential to the execution of the work, no matter how fast or slow the progress. We, therefore, have asked for compensation for this group of men whose performance was entirely governed by the availability of materials with which to work.

“2. Proof of ownership of all equipment mentioned.

“3. Necessity for retaining each and every piece of said equipment.

“4. Certified receipts on the rental of this equipment.

“We have prepared a tabulation on all of the equipment listed in our claim, which gives the ownership and/or rental suppliers' names, or invoices for this equipment, as the case may be. This tabulation also sets forth the operation for which this equipment was used.

“Invoices covering rental or purchase of the equipment [209] have also been enclosed.

“We trust this to be the information which you desire so that you may give full consideration to this claim.

Yours truly,

POWER SERVICE CORP.,
By W. LYLE BORST,
Chief Engineer.” [210]

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing:) Now, turn back to Exhibit No. 32 (1), under paragraph numbered four, where it says, "We have prepared a tabulation on all of the equipment listed in our claim which gives the ownership and/or rental suppliers' names, or invoices for this equipment, as the case may be. [211] This tabulation also sets forth the operation for which this equipment was used. Invoices covering rental or purchase of the equipment may also be enclosed. We trust this to be the information which you desire so that you may give full consideration to this claim." Now, Mr. Borst, is this tabulation, marked Exhibit 32(3) the tabulation you referred to in that letter to the defendant?

A. Yes, sir.

Q. And are those letters the letters to which you referred? A. Yes, sir; that is right.

Q. I hand you Exhibit No. 33, and ask you to identify it for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit 33, for purposes of identification.)

A. That is a letter to Cory-Joslin, dated June 6, 1945 from the Power Service Corporation.

Mr. Watts: I offer in evidence Exhibit No. 33 which reads as follows:

"Gentlemen: Attention Mr. Karl V. Vasecik.

"It has been some time since we have had any word from you relative to our contract settlement.

(Testimony of W. Lyle Borst.)

“Would appreciate your letting us know what the status of the matter is at this time. [212]

“Yours truly,

POWER SERVICE CORPORATION,

By W. LYLE BORST,

Chief Engineer.”

The Court: Do you have any objection to that?

Mr. Scholz: Nothing.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 33, marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) I hand you document which has been marked as Plaintiff's Exhibit No. 34. Will you please identify that for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit 34, for purposes of identification.)

A. That is a letter from Mr. Vasicek, or from Cory-Joslin & Macnsons, by Karl Vasiciek, addressed to the Power Service Company, and it is dated June 16th, 1945.

Mr. Watts: We offer this letter in evidence.

The Court: If there is no objection, it may be admitted.

Mr. Scholz: I will wait until Mr. Watts reads the letter.

Mr. Watts: It reads as follows:

“Attention W. Lyle Borst:

“In reply to your letter of June 6th, 1945 rela-

(Testimony of W. Lyle Borst.)

tive to the proceedings of your claim for additional compensation [213] to your contract settlement, we wish to advise that this claim has been turned over to the Engineering and Legal Departments for further investigation of facts relative to same. We expect a decision in the matter within the next few days, and at that time these findings will be presented to the resident engineer for his final disposition.

Yours truly,

KARL V. VASICIEK,
Project Manager."

and that shows a carbon copy to Mr. Hagen and to Phil Dergance.

Mr. Scholz: We have no objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 34, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) I hand you Exhibit No. 35, will you identify that for the record, please?

(Whereupon Plaintiff's Exhibit 35, being document referred to, was marked for purpose of identification.)

A. It is a letter from the Power Service Corporation to Cory, Joslin & Maensons, and it is dated June 30th, 1945.

(Testimony of W. Lyle Borst.)

Mr. Watts: This is a letter from the plaintiff to the defendant, and it reads:

“Gentlemen:

“In reference to our lump sum contract No. 5, to [214] F. F. Construction Subcontract No. 5, Principal contract numbered W-461, Engin.-10274, dated July 11th, 1944.

“On February 21st, 1945, we submitted a claim to your company for additional compensation in connection with the subject contract. Since submitting that claim we have given the matter further consideration and now withdraw,—wish to withdraw it, and submit in lieu thereof this revised claim for additional compensation.

“This claim is based upon the fact that due to misleading representations, and inconsistencies in the specifications and contract, the completion of the contract was delayed forty days, and seriously increased our cost of doing the work.

“The contract required completion of the work in one hundred twenty days, which would certainly have been accomplished had conditions prevailed that were set forth specifically in the contract documents.

“Paragraph 5-04 (c) of the contract specifications states: ‘Nearly all of the materials required for the work has been stored in Power House No. 1, or in warehouses adjacent thereto.’ We maintain that nearly all of the materials required for the work were not stored in Power House No. 1 or in warehouses adjacent [215] thereto.

(Testimony of W. Lyle Borst.)

“The contract under paragraph of 1-05 of the specifications states: ‘The subcontractor will be required to commence work under the subcontract within five calendar days after the date of receipt by him of notice to proceed, and will be required to prosecute the said work faithfully and energetically, and to complete the work within one hundred and twenty calendar days, the time to be computed from the said date of receipt of notice to proceed, except as provided hereafter in this paragraph.’ This paragraph 1-05, coupled with paragraph 5-04, is seriously misleading to the bidder, and when submitting his proposal the bidder rightly assumed conditions that did not exist, and as a consequence he bid a lower figure than he would have had the true facts been available to him. Completion in one hundred twenty days, as required, becomes a physical impossibility because an important part of ‘the materials required’ were not available.

“The critical materials that seriously delayed and interfered with the construction program were, viz: The water-wall tubes for all three boilers, and water-wall headers for No. 3 boiler which were not manufactured correctly and had to be replaced, and [216] header for No. 2 boiler which was manufactured incorrectly, having three and one-half inch diameter holes instead of three-inch holes, and making it necessary to cut off the ends of all of the tubes entering these holes, and weld on a short sec-

(Testimony of W. Lyle Borst.)

tion of the tube formed as an increaser to fit the three and a half inch hole drilled in error.

“Our proposal and construction program to meet the contract conditions required that these important items were to be on the job available for installation when needed. The installation of the water-wall tubes should be done early in the erection program, and their installation must be completed before the erector can proceed with the hydrostatic tests, the erection of the boiler brickwork and casing, boiler piping, combustion control and boiler trim.

“After being awarded the contract, and while taking inventory of the boiler materials, it was discovered that these serious shortages existed. To the best of our knowledge no one connected with the Area Engineer's office, Lozier, Broderick & Gordon, or Cory, Joslin & Maensons organization was aware of this shortage until after the contract had been awarded. In the time allowed for preparation of the bid, it [217] would have been impossible for any bidder to have determined by observation prior to the letting whether or not there was a shortage of this material, as to have done so would have required the moving and handling of several hundred tons of material, and would have required much more time than was available.

“The delay occasioned by the shortages of the above-mentioned major equipment is scheduled as follows: Where we have stated ‘material required,’ that is the date on which materials should be avail-

(Testimony of W. Lyle Borst.)

able if we were to complete the contract in the one hundred twenty days allowed."

And then follows the exact enumeration of boiler one, two and three, and I see no necessity of reading that, and then we proceed again:

"These delays, as listed above, show a full delay of forty-three days, and we therefore claim the total delay of forty days, which we were actually on the job over and above the one hundred twenty days prescribed by the contract, Paragraph 1-05 of contract specifications.

"Our claim follows: We claim for additional compensation to cover our costs for forty days additional time required by us over and above the one hundred twenty days stipulated by the contract. Notice to [218] proceed with the work was received on July 13, 1944, so that we should have completed our work on November 9th, 1944, but due solely to shortage of critical items of material we did not complete our contract until December 19, 1944, making a delay of forty days. During these forty days our general overhead expense for supervision and for rental equipment was as follows:"

And then follows the same enumeration as to that, and these different sums total \$5,759.94, and with the payroll taxes and social security, amounting to \$198.39, it makes a total of \$5,958.33, which was for supervision, and there is a note at the bottom, "Expenses paid for all personnel from home office." Following that item of supervision expense comes the schedule headed, "Equipment rental

(Testimony of W. Lyle Borst.)

schedule," which is \$2,313.33, making a total of \$8,271.66, with an overhead amounting to \$827.16, which makes a total of \$9,098.82. Added to that is an item of "margin, ten per cent, \$909.88, which makes a total of \$10,008.70, and then follow the last two paragraphs of that letter which read as follows:

"We feel that we are entitled to this additional compensation because had we based our proposal on completion in one hundred sixty days instead of one hundred twenty days these figures would have been [219] included in our estimate and computations, but due to the misleading information and inconsistencies in the contract documents we could not have foreseen the forty days delay, and therefore could not make provision for it when bidding.

"We wish to point out that our operations, although purposely curtailed and paced to the one hundred sixty days was at all times up to the revised schedule, and had the materials been available there is no doubt but that the one hundred and twenty days contract date would have been realized.

Yours truly,

POWER SERVICE
CORPORATION,

By W. LYLE BORST."

Q. (Mr. Watts, continuing:) Did you get a reply to this? A. Yes, sir.

Q. I now hand you exhibit marked Plaintiff's Exhibit No. 36, will you identify that for the record?

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit 36, for purposes of identification.)

A. It is a letter addressed to the Power Service Corporation from Cory, Joslin & Macnsons. It is dated July 11th, 1945. [220]

Mr. Watts: I offer in evidence Plaintiff's Exhibit No. 36, if the Court please.

The Court: If there is no object to No. 35, it will be admitted.

Mr. Gibson: All this is subject to the blanket objection.

The Court: This would not be subject to the other objection, would it? It does not apply to the damages?

Mr. Watts: It applies to both claims.

The Court: Very well. You may go ahead.

(Whereupon, Plaintiff's Exhibit No. 36, for identification, was admitted in evidence.)

Mr. Watts: This letter, Exhibit No. 36, reads as follows:

“Attention Mr. W. Lyle Borst, Chief Engineer.

“Re: Claim of Power Service Corporation against Cory, Joslin & Macnsons for compensation in addition to contract price set forth in L. S. Subcontract No. 5 to F. F. Construction Subcontract No. 5, to Principal Contract No. W-461-Eng. 10274.

“Gentlemen:

“This again acknowledges receipt of your letter of February 21, 1945, in which you demand compensation in the amount of \$9,323.02, in addition to

(Testimony of W. Lyle Borst.)

the contract [221] price set forth in the above mentioned L. S. subcontract by reason of your statement 'Major and important material was not on the job when required', particularly water-wall tubes and proper water-wall headers. Further, this acknowledges receipt of your certificate of ownership of certain items of equipment, dated March 14th, 1945, and also your letter of March 19th, 1945, with its enclosed receipts for the payments of rentals by you on certain rented equipment. This letter also acknowledges receipt of your letter of June 30th, 1945, under and by the terms of which you have revised your demand as set forth in your letter of February 21st, 1945, to the extent that the original amount thereof has been increased to \$10,-008.70.

"Please be advised that Cory, Joslin & Macnsons has made a careful study of the facts stated in all of the foregoing letters as a result of which Cory, Joslin & Macnsons is unable to determine, first, the actual number of days of delay, if any, chargeable to the alleged delayed delivery of water-wall tubes and proper water-wall headers; second, the true and correct amount of your claim; and third, the part of your claim, if any, properly chargeable to the alleged delay of delivery of said materials.

"Accordingly, Cory, Joslin & Macnsons is herewith [222] denying your claims, and both of them, in their entirety.

"In connection with this denial your attention is

(Testimony of W. Lyle Borst.)

directed to paragraph 1-11 of the specifications attached to and made a part of said L. S. Subcontract No. 5, and to Article Six on page 8-D of said subcontract.

Very truly yours,

CORY, JOSLIN & MACNSONS,
By CARL V. VASICIEK,
Project Manager,"

and that indicates that a carbon copy was sent to P. Dergance, J. Hagan, and Major Thomas.

The Court: So that the record will be clear, this general objection only runs to the testimony in regard to the additional amount of the claim that was filed after the receipt given in settlement. I take it there is no general objection to this exhibit.

Mr. Gibson: I understood that we had an objection against the admission of this testimony with reference to Counts two and three, with reference to the reformation of the contract.

The Court: I am afraid that Counsel has gotten away from that phase of it. There was a statement made that when you were introducing testimony in connection with Count [223] that you were doing it, and so that the record would be clear, you were to tell us that the testimony was being offered in support of Counts two and three. Now, I take it that a good deal of the testimony has been introduced on these various counts?

Mr. Watts: That is right, and I neglected to call your Honor's attention to it.

(Testimony of W. Lyle Borst.)

Mr. Gibson: I thought this was all in support of Counts two and three, and I understand now this is going in as to the Count one.

The Court: I think we will have to have that understanding. I think you are right that some of this would not be admissible to Count one, but a great deal of it is put in as to Count one. When Counsel left Counts two and three he was to say that the testimony he was now introducing was in support of Count one.

Mr. Watts: That is true. I neglected to advise your Honor, but I will say that I am inclined to think that this would be admissible under either of the counts.

Mr. Gibson: I take it from counsel's statement that if this was admissible it was admissible under Count one as well as under Counts two and three. For the sake of the record I would like to have the objection go to Count one. If the Court reforms the contract as suggested in [224] Count two then this would be admissible under Count three, and I register my objection to this under Count one now, that is, under the contract as it now exists under Section 1-05 of the general clause, and under Article three of the subcontract. They show receipt of a lump sum and nothing else.

The Court: This testimony does not prove anything. It simply shows the actions on the part of the plaintiff in presenting its claims.

Mr. Gibson: I am referring now, your Honor, to the bulk of the testimony introduced here. When

(Testimony of W. Lyle Borst.)

the Court said that counsel should let him know when he was putting in testimony as to Count one,—

The Court (interposing:) He is on the question of damages, as I understand it.

Mr. Gibson: I understand his purpose is to offer it as such, and I want to object to it as not admissible under the contract.

Mr. Watts: I offer it for both Counts,—Count one and Count three. My understanding of the procedure under the new rules that the Court is now acting under, and I understand will follow the rules in effect now, and under those I understand the Court is now receiving testimony, and that that testimony may apply to any issue in the action.

The Court: Yes, that is true, but counsel is entitled to have his record, so that a ruling of the Court may be made and so that it be may reviewed by the Higher Court if necessary, and they have not had an objection in the record as to Count one at this time, and the Court stated to you, Mr. Watts, that whenever you transferred back to Count one you would advise the Court, and then this general objection would be made, if they desired. I think the only way to handle it is that the general objection,—I am not sure how to handle it. The Court is in the position of determining now what proof applies to Count one, if it does, and rule that it does apply to that Count. I think I will ask that the objection be reinsated in the record so that they

(Testimony of W. Lyle Borst.)

would not be waiving their right to the objection to any testimony in here as to Count one.

Mr. Watts: And may the record show from this point forward that I am offering all the testimony as to Counts one, two and three.

Mr. Gibson: At this time I want the record to show that we object to any testimony on the question of damages as to Count one, on the theory that Count one covers the contract as is, and does not provide for any damages. It is incompetent, irrelevant and immaterial, and without the terms of the contract as written. [226]

Mr. Watts: I think that is premature. I am not proving the measure of damages. I am establishing that the claim was made and filed. I am not trying to prove damages now. I am establishing the fact that we made a claim, and then we will come back and establish the damages later.

The Court: I am not sure now what state the record is in, but I think you may proceed, and in making my rulings I will endeavor to clear this up.

Q. (Mr. Watts, continuing:) Will you please identify Exhibit No. 37 for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 37 for purposes of identification.)

A. That is a letter addressed to Cory, Joslin & Macsensons from the Power Service Corporation.

Mr. Watts: I offer Exhibit No. 37 in evidence at

(Testimony of W. Lyle Borst.)

this time. It is a letter,—and if there is any question about the previous exhibit, I will re-offer that.

The Court: That is the letter denying liability?

Mr. Scholz: We have no objection to that.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 36 for identification, was admitted in evidence.) [227]

Q. (Mr. Watts, continuing:) Now, will you please identify exhibit marked No. 41 for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit 41 for purposes of identification.)

The Court: Mr. Watts, what happened to Exhibit No. 38?

Mr. Watts: No. 38 was introduced some time ago, and as I recall now it was also read into the record.

The Court: Very well. I was not exactly clear on that. You may proceed.

Q. (Mr. Watts, continuing:) Now, Mr. Borst, identify Exhibit No. 41 for the record.

A. No. 41 is the copy of a letter to Major Thomas,—Major Homer D. Thomas, Area Engineer, and it is from the Power Service Corporation. It is dated July 24th, 1945.

Mr. Watts: We offer Exhibit No. 41 in evidence, which is as follows:

(Testimony of W. Lyle Borst.)

“Dear Major Thomas:

“Reference our Lump Sum Contract No. 5 to F. F. Construction Subcontract No. 5, Principal Contract No. W-461-Eng.-10274, dated July 11th, 1944.

“On June 30th, 1945, we submitted a claim to [231] Cory, Joslin & Macnsons for additional compensation in connection with the subject contract. This claim was submitted in lieu of a similar claim which had been made on February 21st, and which we withdrew.

“This claim of June 30th, 1945, has been denied by Cory, Joslin & Macnsons and we are now submitting this claim to you.”

and then follows the claim, which totals \$10,008.70.

The Court: Is there any objection?

Mr. Scholz: I understand you are filing the claim pursuant to contract 1-11, and if denied you may take an appeal under the contract. If that is the purpose we have no objection. If there is any other, or any hidden purpose, we will object.

Mr. Watts: I will tell you the purpose: The purpose is to bring all of the facts before the Court. The truth of the matter is that under the law the plaintiff had no right to follow the procedure it is following. We are coming to the point where the chief engineer ruled this was not proper procedure. We cannot file a claim for damages before the Engineer, and that we had to come to a civil court.

The Court: That is a matter for the Court's decision. This exhibit may be admitted. [232]

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing:) Will you please identify Plaintiff's Exhibit No. 41-A?

(Whereupon document referred to was marked Plaintiff's Exhibit 41-A for purposes of identification.)

A. It is a letter from the War Department, United States Engineers' Office, to the Power Service Corporation, dated August 31st, 1945.

Q. Signed by whom?

A. Signed by Major Thomas.

Mr. Watts: I will read this letter.

The Court: Before you start on that, Mr. Watts, we will take a recess for fifteen minutes.

March 20th, 1947, 3:15 p.m.

Mr. Watts: I now offer in evidence exhibit which has been marked Plaintiff's Exhibit 41-A. It is a letter dated August 31st, 1945, addressed to the Power Service Corporation, Minneapolis, Minnesota.

Mr. Gibson: We object to it as incompetent, irrelevant and immaterial, to either the point of reformation of the contract, or the question of damages. Counsel has made a statement here as to his remedy being by claim in a court of competent jurisdiction.

The Court: You may read the exhibit. The Court will rule later on this. [233]

Mr. Watts: Exhibit No. 41-A is as follows:

"Gentlemen:

"Reference is made to your letter of July 24th, 1945 appealing (under Article Six of your subcon-

(Testimony of W. Lyle Borst.)

tract) from the denial of your claim by Cory- Joslin & Macnsons for payment of \$10,008.70 as additional costs incurred as a result of the increased time for completion of your subcontract No. 5 to F. F. Construction Subcontract No. 5 to principal contract No. W-461-Eng.-10274. Said subcontract No. 5 provides for the complete erection of boilers in Power House No. 1 at the Sunflower Ordnance Works, Johnson County, Kansas.

“Your acceptance of the subject subcontract was qualified (in anticipation of filing the subject claim) by attaching thereto the following quoted appendage:

“‘This contract is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05 of the specifications.’

“Your rights to file claims as asserted in the above quotation, were fully protected and provided for [234] in Article six of the subcontract and paragraph 1-11 of the specifications thereto. The undersigned finds, however, that the above quoted appendage in no manner modifies the provisions of the subcontract or specifications made a part thereof, and therefore the bearing of paragraph 1-05 of the specifications (referenced in the appendix) on the subject claim must be considered in the light of the

(Testimony of W. Lyle Borst.)

express unaltered wording thereof as hereinafter set forth.

“Subparagraph (a) of article one of the subcontract provides that the work performed under the subcontract must be commenced and completed in accordance with paragraph 1-05 of the specifications. Subparagraph (a) of said paragraph 1-05 provides as follows:

“‘The subcontractor will be required to commence work under the subcontract within five calendar days after the date of receipt by him of notice to proceed, and will be required to prosecute said work faithfully and energetically, and to complete the work within one hundred twenty calendar days, the time to be computed from said date of receipt of notice to proceed, except as provided hereafter in this paragraph.’

“Inasmuch as you acknowledged receipt of the notice to proceed on July 13th, 1944, you were (in accordance [235] with the above quoted paragraph) required to complete performance by November 10th, 1944.

“All work was not, however, completed by the aforementioned date of November 10th, 1944, and it was considered that an extension of thirty-six calendar days (or to December 16th, 1944) was justified. Accordingly, Modification No. 3 Change Order providing in part for such extension was submitted to you for acceptance. You refused to accept the time extension on the basis that acceptance of same would possibly constitute a waiver of

(Testimony of W. Lyle Borst.)

your rights to reimbursement of the increased costs incurred during the thirty-six calendar days increased time for completion. In accordance with your request, Modification No. 3 was rewritten, and as finally executed provided only for construction change items and no provision was made for additional time.

“Your attention is invited to the fact that your refusal to accept the additional time originally provided in Modification No. 3 was contrary to that portion of Paragraph 1-05 (e) which stipulates that ‘It is distinctly understood and agreed that the subconstructor will accept additional time,’ (underscoring supplied) “as authorized in said modification.

“It is further found that the entire amount claimed [236] (\$10,008.70) represents your computation of expenses incurred during the increased time for completion. Allowance of such costs is expressly prohibited by paragraph 1-05 (e) in accordance with which you are required to accept any additional time allowed ‘in full satisfaction of the delays encountered’ and Cory, Joslin & Macnsons ‘will not be liable for any expenses incurred by the subconstructor as a result of the increased time for completion.’ (Underscoring supplied.) The contracting officer finds that your claim is on a basis clearly in direct contradiction to the latter quoted provisions.

“Your claim is, therefore, denied.

(Testimony of W. Lyle Borst.)

"Your attention is invited to your rights to appeal to the Chief of Engineers from the foregoing decision within thirty days from the date of this decision, as provided in Article Six of the sub-contract. Processing of such an appeal through the undersigned Contracting Officer will expedite action thereon.

Sincerely yours,

HOMER D. THOMAS,

Major, Corps of Engineers,

Contracting Officer." [237]

Mr. Gibson: My objection is before the Court. I don't see what it has to do with this case. It is an attempt to have this Court affected by the ruling of the Area Engineer.

The Court: I think that is correct. It would only be admissible as showing the different steps taken by the Engineer, and it could not influence this Court. That is plain to be seen, that this Court could not be influenced by that decision, because this decision is up to the Court, and not to the engineer. I am going to accept this exhibit, just for the reason that I don't want to pass finally on this question hurriedly. It will be accepted subject to the objection, and it will also be understood that a motion to strike is made at this time. The Court will take it under advisement, but I cannot now see any purpose for its admission except to show the steps taken in connection with his contract, and the fact that he had presented his claim.

(Testimony of W. Lyle Borst.)

Mr. Watts: Very well. Your Honor. Now, I will proceed with my examination.

The Court: Yes; go ahead.

(Whereupon Plaintiff's Exhibit 41-A for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) Please identify Exhibit [238] No. 42 for the record now, Mr. Borst.

(Whereupon document referred to was marked Plaintiff's Exhibit 42, for purposes of identification.)

A. Exhibit No. 42 is a letter dated September 7th, 1945, addressed to the United States Engineers' Office, Sunflower Ordnance Works, Kansas City, Missouri, and it is from the Power Service Corporation.

Mr. Watts: I offer in evidence Exhibit No. 42, which is signed by Mr. Borst, and addressed to the United States Engineers' Office for the attention of Major Homer D. Thomas, Contracting Officer.

Mr. Gibson: May my last objection apply to the proposed exhibit, which is No. 42, as I understand it?

Mr. Watts: That is right, Exhibit No. 42.

Mr. Scholz: So that the Court may be fully advised, I think your Honor should keep in mind this Article Six, which is as follows: "All disputes concerning questions of fact arising under this subcontract shall be decided by the Contracting Officer, whose decision shall be in writing, subject to appeal by either party hereto within thirty days from the receipt of the Contracting Officer's decision to the

(Testimony of W. Lyle Borst.)

Chief of Engineers, whose decision shall be final and conclusive upon the parties hereto. Notwithstanding this provision, the subconstructor shall diligently proceed with the [239] work as directed.”

The Court: I see your position, but it is a matter that I don't want to pass on hastily. You may proceed, Mr. Watts.

Mr. Watts: This letter reads,—it has reference to the same contract that we have referred to in many of these other exhibits:

“Receipt is acknowledge of your letter of August 31st reference to our claim for additional costs incurred on the subject contract with Cory, Joslin & Macnsons.

“We wish to exercise our right of appeal to higher authority, in this case the Chief of Engineers. We therefore request that you forward our claim to the Chief of Engineers for further consideration.

“We note what you say with reference to the terms of the contract, but you have not touched upon and apparently given no consideration to the fact that there was a breach of contract on the part of Cory, Joslin & Macnsons. It was their contractual obligation to supply the materials for construction, and these were stated to be nearly all on the site at the time the contract was made. We quote paragraph 5-04 (c) of the specifications, as follows: ‘Nearly all the materials required [240] for the work has been stored in Powerhouse No. 1, or in warehouses adjacent thereto. Materials, equip-

(Testimony of W. Lyle Borst.)

ment and machinery which have been stored, and which have been subjected to the conditions necessitating reconditioning, refinishing, re-facing, cleaning, painting, packing (in valves and pumps) and similar work to properly prepare for installation and operation, will be reconditioned, refinished, etc., by the subconstructor as a part of this subcontract, except, however, that such reconditioning, refinishing, etc., shall apply only to the defects have resulted from storage, and does not include inherent defects in manufacture or materials. Materials, equipment and machinery which have been broken, or otherwise damaged beyond use or repair during storage, or which have inherent defects in manufacture of materials caused through no fault or negligence of the subcontractor will be replaced by the constructor without cost to the subcontractor.' These were not nearly all on the site at the start of the work. The shortages have been covered in our claim of July 24th, 1945.

"This defection on the part Cory, Joslin & Macnsons made fulfilment of the obligation to complete on November 10th, 1944, impossible for this contractor to accomplish. [241]

"This serious breach of the contract on the part of Cory, Joslin & Macnsons caused the serious financial loss as set forth in our claim.

"We assume that you have all of the information necessary to institute the appeal to the Chief of Engineers. We will at this time add nothing to our claim of July 24th, 1945, and presume that the orig-

(Testimony of W. Lyle Borst.)

inal claim with this letter is all that is needed for presentation to the Chief of Engineers.

Yours very truly,

POWER SERVICE CORPORATION.

By W. LYLE BORST,
Chief Engineer."

Q. (Mr. Watts, continuing:) Was your claim so submitted?

Mr. Gibson: This is the first time, the first letter, or any indication that the plaintiff is accusing the defendant of the breach of contract. It is not a letter addressed to the defendant, but to the United States Engineers' Office. It is not a direct letter to us. I don't think it is admissible.

The Court: I feel, perhaps, that counsel for the defendant is correct. However, I am going to admit subject to a motion to strike, and subject to this objection, and I will consider that the motion to strike has been made at this time, and will take it under advisement. [242]

(Whereupon Plaintiff's Exhibit 42, marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) Do you know, Mr. Borst, whether the claim was submitted,—strike that please. Mr. Borst, do you know whether or not the claim you submitted to the Area Engineer was sent to the Chief of Engineers? If not, what happened?

A. As I remember, it was sent on directly.

(Testimony of W. Lyle Borst.)

Q. I will ask you now to identify what has been marked as Plaintiff's Exhibit No. 43.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 43, for purposes of identification.)

A. That is a letter addressed to the Chief of Engineers, U. S. Engineers Office in care of Major Howard D. Thomas, Contract Officer, Sunflower Ordnance Works, Kansas City, Missouri. It is dated September 29th, 1945.

Q. And what occasioned your writing a letter to the Chief of Engineers?

A. In view of our having been denied our claim from the Major at Sunflower.

Q. Did the Major send forward your appeal as requested?

Mr. Scholz: That is objected to. It is immaterial.

A. I believe this is a continuation of the same claim made through the Chief of Engineers. [243]

Q. This is addressed to the Chief of Engineers?

A. Yes, sir.

Q. Do you know whether the claim you submitted to the Area Engineer was, or was not, forwarded to the Chief Engineer, and that you were required to do so?

A. I think that was covered by a clause that could be interpreted,—

Mr. Scholz: (Interposing:) We will stipulate that he received a reply from the Chief of Engineers, or whoever it was, that under the contract

(Testimony of W. Lyle Borst.)

had required that he address it to the Chief Engineer and send it through the proper channels.

Mr. Watts: What happened was this: The Area Engineer refused to send it forward, and instead of writing a letter he told us to make a claim direct to the Chief Engineer.

Mr. Scholz: Yes, and send it through the proper channels.

Mr. Watts: We asked for it to be done that way, and the Area Engineer refused, and we sent it direct to the Chief Engineer.

Mr. Scholz: May I call the Court's attention to paragraph 1-11 of the contract, under the general provisions and specifications, and it reads: "If the subcontractor considers any work demanded of him to be outside of the [244] requirements of the subcontract, or if he considers any action or ruling of the constructor, of the inspectors, to be unfair, the subcontractor shall, without undue delay, upon such demand or ruling, submit his protest thereto in writing to the Contracting Officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the subcontractor his decision thereto in writing. If the subcontractor is not satisfied with the decision of the contracting officer, he, within thirty days, appeal in writing to the Chief of Engineers, whose decision, or that of his duly authorized representative, shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of

(Testimony of W. Lyle Borst.)

record in the manner herein specified, and within the time limit stated, the records, rulings, instructions or decisions of the contracting officer shall be final and conclusive. All appeals from the decisions of the Contracting Officer authorized under the subcontract shall be addressed to the War Department, Chief of Engineers, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the subcontractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor [245] in the subcontract."

A. That is what we did here.

Mr. Watts: We offer Exhibit No. 43:

"Chief of Engineers,

United States Engineers Office,

C/o Major Homer D. Thomas, Contracting Officer,
Sunflower Ordnance Works, P. O. Box 36,
Kansas City, Missouri,"

and then it shows the subject matter as being the same contract that we have referred to on numerous occasions here.

"Gentlemen:

"On September 7th we submitted a request to Major Thomas asking that he pass on to the Chief of Engineers our claim of July 24th, 1945 for additional costs incurred on the subject contract with Cory, Joslin & Macnsons. We have now been advised by Major Thomas that it is necessary for us

(Testimony of W. Lyle Borst.)

to present our claim to the Chief of Engineers, instead of requesting that it be passed on by him.

“We hereby state our claim.

“In connection with our Lump Sum Contract No. 5 to F. F. Construction subcontract No. 5, Principal Contract No. W-461-Eng-10274, dated July 11th, 1944, we make claim for additional compensation.” [246]

Then there is a copy of exactly the same letter that has been before this Court, at least four times, giving the dates when the material was required, and a list of the names of the employees and the amounts paid to the various employees, and the total amount of the claim.

The Court: Is there any objection to this exhibit?

Mr. Scholz: The same objection that was made before.

The Court: And the same ruling.

Q. (Mr. Watts, continuing:) In connection with that, the report was sent forward to the Chief of Engineers? A. That is right.

Q. And is that the letter sent with the findings of fact which you have in your hand now?

A. Yes; this is the letter to the Power Service Corporation,—

Q. (Interposing:) What is the document attached to it, Mr. Borst?

A. That is the findings of fact by that engineer.

(Testimony of W. Lyle Borst.)

(Whereupon Plaintiff's Exhibit 43, for identification, was admitted in evidence.)

Mr. Watts: We offer in evidence Exhibit No. 44.

The Court: Is there any objection? [247]

(Whereupon document referred to was marked Plaintiff's Exhibit 44 for purposes of identification.)

Mr. Scholz: The same objection we made to the former documents.

The Court: I cannot see where it is material, but I will make the same ruling.

(Whereupon Plaintiff's Exhibit 44 for identification, was admitted in evidence.)

Mr. Watts: This letters is dated the 8th of November, 1945, addressed to the Power Service Corporation, Wesley Temple Building, Minneapolis, Minnesota:

"Gentlemen:

"Reference is made to your appeal dated the 29th of September, 1945, to the Chief of Engineers under your subcontract No. 5 at this project. Inclosed is your copy of the findings of fact in connection with the appeal. Additional copies of the findings of fact, together with your appeal, will be forwarded to the Chief of Engineers for his consideration in rendering a decision in the case. You are hereby invited to submit to this office, within fifteen days from the date of this letter, any com-

(Testimony of W. Lyle Borst.)

ments concerning the findings of fact that you might consider appropriate. Such comments will be forwarded [248] with your appeal. The appeal will be forwarded at the end of said fifteen days, in the event no comments are received.

Sincerely yours,

HOMER D. THOMAS,

Major, Corps of Engineers,
Contracting Officer."

and this indicates a carbon copy to Cory, Joslin & Macnsons together with a copy of the findings of fact. The findings of fact which are attached to the letter I just read are as follows:

"FINDINGS OF FACT

"Appeal of Power Service Corporation from denial of its claim for \$10,008.70, representing alleged increased costs incurred as the result of delays in completion of work under Lump Sum Contract No. 5, to Fixed Fee Subcontract to No. 5 to Principal Contract No. W-461-Eng.-10274.

"The contract:

"The contract involved is Lump Sum Contract No. 5 to Fixed Fee Subcontract No. 5 to Principal Contract No. W-461-Eng.-10274; Lump Sum Contract No. 5 in the original amount of \$448,000.00 was entered into 11th July 1944 by and between W. E. Joslin, an individual of the City of San Francisco, in the State of California, [249] doing

(Testimony of W. Lyle Borst.)

business as the Cory, Joslin & Macnsons, the Fixed Fee plumbing, heating and ventilation construction subcontractor at the Sunflower Ordnance and Power Service Corporation, with principal offices in Minneapolis, Minnesota. It provides for the erection of three boilers in Power House No. 1 at Sunflower Ordnance Works. Cory, Joslin & Macnsons is referred to in the subcontract as the "constructor," and the appellant is referred to as the "Subconstructor,"

"The claim:

"The appeal dated 29 September 1945 is from a decision of the Contracting Officer denying the subcontractor's claim dated 24 July, 1945, in the amount of \$10,008.70 for increased costs alleged to have been incurred by claimant due to delays in completion of the work beyond the date fixed for such completion in the subcontract. It is alleged by claimant that the delay in completion of the work under the subcontract was the result of delays on the part of Cory, Joslin & Macnsons in furnishing water-wall tubes and water-wall headers.

"The findings:—"

Mr. Gibson: You are now reading from those Findings of Fact, are you, Mr. Watts? [250]

Mr. Watts: Yes, I am.

Mr. Gibson: We object as not within the power of the officer. That, Congress says, must be passed upon by a Court of competent jurisdiction, the Court of Claims.

(Testimony of W. Lyle Borst.)

The Court: I will admit it with the same understanding as to the others.

Mr. Watts (Continuing reading):

“Subparagraph 1:

“Article 1 and subparagraph 1-05 of the specifications provide that the work shall be commenced within five calendar days after the date of receipt of Notice to Proceed, which date is 13 July, 1944. Subparagraph 1-05 (a) further provides that the work shall be completed within one hundred twenty calendar days from said date of receipt of Notice to Proceed. Three contract modifications were issued, none of which provided for extensions of the contract period. Accordingly, the subcontract should have been completed on 10 November 1944. Actually, the work was completed 19 December, 1944, or thirty-nine days after the date specified for completion. The appellant, using the same dates, states that the subcontract work was completed forty days late. By letter dated 10 November 1944 (Exhibit A) the subcontract completion date, the [251] sub-constructor put the constructor on notice that due to pauses listed in the letter which dealt with the delayed delivery of materials the work had not been completed and an extension of time was requested. (Also see paragraph four in connection with notice of delays.) It is estimated before actual completion was accomplished that the work would be completed by 16 December and a change order, modification No. 3, was issued providing for an extension of time until 16 December. The sub-

(Testimony of W. Lyle Borst.)

constructor refused to accept the time extension on the basis that to do so might possibly constitute a waiver of its rights to reimbursement of increased costs considered to have been incurred as a result of the increased time for the completion of the work. The modification was rewritten to provide only for construction changes, without provision therein for additional time. The time extension was offered the subcontractor in accordance with subparagraph 1-05 (d) and (e) of the specifications, which are quoted as follows:

“1-05 (d): ‘If the subcontractor fails to perform the work at a rate satisfactory to the constructor as specified in said section (a) above by reason of delays in the delivery of materials or supplies essential to [252] such performance because of war priorities or because of conditions existing through no fault or negligence of the subcontractor, he may be excused from such failure upon the presentation to and the approval by the constructor of a written statement setting forth distinctly the causes for such failure.

“1-05 (e). In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete the subcontract in full satisfaction of any delays encountered, and the constructor will not be liable for any costs or expenses incurred by the subcontractor as a result of the

(Testimony of W. Lyle Borst.)

increased time for completion of the subcontract.'

"Subparagraph No. 2:

"In connection with the provisions of Paragraph 1-05 of the specifications, the subcontractor refused to execute the formal subcontract until the following provisions was inserted on the signature page of the subcontract: 'This contract is signed and executed by The Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages [253] by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05 of the specifications.'

"Subparagraph No. 3:

"There were several agencies involved in the furnishing of the equipment and materials to be installed in the powerhouse. The appellant was not required by his contract to furnish the boilers, nor other related equipment. The appellant was only to install equipment furnished by others. Actually, the Hercules Powder Company, the operator of this plant, procured the necessary equipment and made it available for installation. This particular powerhouse had been started by the operating firm under a subcontract awarded by them. This subcontract was cancelled before complete delivery; however, it had been provided for both the furnishing of the equipment and the installation thereof, and the installation was the cancelled part. Such cancellation did not take place until part of the installa-

(Testimony of W. Lyle Borst.)

tion had been accomplished. All of the equipment except certain pieces hereinafter mentioned was delivered to the project where it was installed or stored. The subcontract provision which provided for the constructor, or others, to furnish materials in subparagraph 5-04 (a) of the [254] specifications which is quoted as follows:

“ ‘5-04. Materials furnished by the constructor. (a). In general, all materials, equipment and machinery which will actually be incorporated into the permanent construction will be furnished by the constructor and/or others. Materials and supplies incidental to the permanent construction, including, but not limited to, cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment, etc. will be supplied by the subconstructor without cost to the constructor over and above the subcontract price. Fuel for use in testing operating equipment, and for putting the plant in operation will be supplied by the constructor. Materials furnished by the constructor will be delivered to the subconstructor at points and in the manner specified. Section 7 thereof.’ ”

“Subparagraph No. 4:

“It was a duty of the appellant to make a list of all materials required and to check that list against the materials on the project available for use in the subconstruction work. That duty was

(Testimony of W. Lyle Borst.)

covered by subparagraph 5-04 (b) of the specifications, which is quoted as follows:

“ ‘5-04 (b). Immediately after starting work under [255] the subcontract the subconstructor shall prepare a list of materials including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the power house in order that shortages may be immediately determined. Such shortages will then be reported to the constructor for use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the subconstructor during the progress of the work, and the subconstructor will be held responsible for advising the constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress.’ The inventory was started as soon as the contractor appeared on the job. While it took a great portion of the subcontract period to complete the inventory because of mass of equipment involved, and because of the manner in which it was stored, it did disclose the fact within a few days after it was started that many water-wall tubes were not present. The operator’s subcontractor had failed to make delivery of such tubes. The subconstructor advised the constructor without delay of the shortages as they were found and the missing items were obtained as fast as possible. At the time that the [256] tube shortage was disclosed the subconstructor put the

(Testimony of W. Lyle Borst.)

constructor on notice that the shortage of tubes would delay completion of the work. Some materials were furnished as much as forty days after the date that they should have been available for orderly and timely completion of the work.

“Subparagraph No. 5:

“The constructor (Cory, Joslin & Macnsons) was not aware until shortly before the contract was awarded that all of the materials necessary to complete the job were not at the project and in addition to requiring the inventory to determine the actual shortages, the subcontract was worded so as to provide that ‘not all’ but only ‘nearly all’ of the materials required for the work were stored at the project. That provision is contained in subparagraph 5-04 (c) of the specifications which is quoted as follows: ‘Subparagraph 5-04 (c). Nearly all of the materials required for the work have been stored in powerhouse No. 1, or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored, and which have been subjected to conditions necessitating reconditioning, refinishing, refacing, cleaning, painting, packing (in valves and pumps) and similar work to properly prepare for installation and [257] operation will be reconditioned, refinished, etc. by the subconstructor as a part of this subcontract, except however, that such reconditioning, refinishing, etc. shall apply only to the defects which have resulted from storage and does not include inherent defects in manufacture or materials. Materials, equipment

(Testimony of W. Lyle Borst.)

and machinery which have been broken or otherwise damaged beyond use or repair during storage, or which have inherent defects in manufacture or materials caused through no fault or negligence of subcontractor will be replaced by the constructor without cost to the subcontractor.'

“Subparagraph No. 6:

“The amount claimed is for actual damages that resulted as an alleged breach of the terms stipulated in paragraph 5-04 (c). The alleged breach of contract is that the amount of materials stored in powerhouse No. 1 and in the warehouse adjacent thereto was not ‘nearly all of the materials required for the work.’ The appellant maintains that the alleged breach of contract, together with a delay caused by an error made by the manufacturer of the headers for boiler No. 2 resulted in the contract being completed forty days late through no fault of the appellant.

Subparagraph No. 7: [258]

“Information obtained from the Hercules Powder Company has disclosed that the total value of equipment procured for the power house was approximately \$1,145,000.00. Such information also disclosed the number of water-wall tubes required for each boiler to be as follows: 80 sidewall tubes; 50 front wall tubes and 108 back-wall tubes. The tubes for the various walls were of different lengths. The total number required for one boiler is 238, which makes a total of 714 water-wall tubes required for the three boilers. The total number of

(Testimony of W. Lyle Borst.)

other types of tubes required for all three boilers was approximately 4,000. Of all tubes required there was a shortage at the start of 160 side-wall water-wall tubes, and 64 back-wall water-wall tubes. The average cost of one side-wall tube is \$88.00, and the estimated price of one back-wall tube is \$119.15. The total estimated value of the missing tubes is \$14,208.00. In connection with the boiler parts delivered after the subcontract was awarded records show that two water-wall headers used in Boiler No. 3 were delivered so as to reach the job on 26 September 1944. Boiler No. 2 had been partially installed by the subcontractor of the Hercules Powder Company. That partial installation included the setting of the two water-wall [259] headers. After the appellant started work on the instant subcontract he discovered that the water-wall headers that had been installed for boiler No. 2 were not in conformity with the design and could not be used. The appellant removed the misfit headers and replaced them with headers stored on the job and intended for boiler No. 3. Modification No. 1 to the subcontract provided for the work necessary to replace the misfit headers. The undersigned has been unable to ascertain the estimated value of the two replacement headers actually obtained and used in boiler No. 3.

“Subparagraph No. 8:

“In regard to Boiler No. 1, the appellant states that water-wall tubes were required on one August,

(Testimony of W. Lyle Borst.)

1944, in order to permit completion within the one hundred twenty day period, but that tubes were not received on 17 August 1944, or sixteen days late. It is found that a large force of boilermakers were installing tubes in Boiler No. 1 during the aforementioned sixteen day period and that the tubes in question could not have been installed on 1 August had they been received for on that date boiler connection tubes which had to be [260] replaced before placement of the water-wall tubes were not in place. From the tube shortage as described in paragraph seven above, it appears that there were at least enough of each type of various water-wall tubes stored at the site for one boiler.

“Subparagraph No. 9:

“In regard to Boiler No. 2 the contractor states that although water-wall tubes were required on 8 August 1944 they were not received until 20 September 1944, or forty-three days late. The contractor also states that all work on this boiler was delayed eighteen days from 30 September 1944 to 18 October 1944, because the tubes which were three inches in diameter had to be revamped to fit three and one-half inch holes in the headers instead of three inch holes. The three and one-half inch holes were erroneously made by the maker of the headers and were due to no fault of the appellant. The tubes were revamped on the project by the manufacturer. It is found that active construction progress on Boiler No. 2 continued from 8 August until 2 September and that full delay started on 5 Sep-

(Testimony of W. Lyle Borst.)

tember. During the period of from 8 August until 2 September other types of tubes were being installed and water-wall tubes would not have been erected until the boiler tubes were in place. Upon [261] receipt of the tubes on September 20, 1944, work on this boiler was resumed. Progress was made on the other two boilers during the aforementioned delay. On 26 September the error in the water-wall headers for Boiler No. 2 was discovered and work on the installation of those tubes was suspended. The manufacturer revamped the tubes to fit the headers by cutting off end sections of the tubes and rewelding tapered ends in place of those cut off so that the tube ends were three and one-half inches in diameter. This alteration was made so that installation of the revamped tubes was started on 18 October.

“Subparagraph No. 10:

“In regard to Boiler No. 3 the contractor states that although water-wall tubes were required on 15 August 1944 they were not received until 20 September 1944. The contractor also states that although water-wall headers for boiler No. 3 were required not later than 15 August 1944 they were not received until 26 September 1944, or forty-one day late. It is found that no work was done in regard to placing water-wall tubes and headers until 26 September.

“Subparagraph No. 11:

“The appellant has the reputation of being a very [262] efficient operator. That firm was regarded

(Testimony of W. Lyle Borst.)

by responsible engineers on this job as having performed the work of completing the power house in very efficient manner. It is found that at the time the tube shortage was discovered the appellant altered its proposed method of operations and paced its work so as to eliminate actual work stoppages. This tends to give the appearances on the progress chart of the job (Exhibit B) that delays in the delivery of tubes and delays caused by misfit headers might not have been the sole reasons why the work was not completed in one hundred twenty days. However, the appellant very probably would have completed the work within one hundred twenty days had all necessary materials been on the job.

“Subparagraph No. 12:

“After the work was completed and in letter dated 21 February 1945 (Exhibit C) the subcontractor made a claim against the constructor in the amount of \$9,323.02 as compensation for the extra costs incurred due to having to work beyond the subcontract completion date through no fault of his own. A revised claim in the amount of \$10,008.70 covering the same items was made in letter dated 20 June 1945 (Exhibit D) to the constructor. This claim of 21 February was denied in letter [263] dated 11 July 1945 (Exhibit E). In letter dated 24 July 1945 (Exhibit F) the letter was submitted to the Contracting Officer in accordance with paragraph 1-11 of the subcontract specifications. This claim was denied in letter dated 31 August (Exhibit G). An appeal of the subconstructor dated 1 Sep-

(Testimony of W. Lyle Borst.)

tember (Exhibit H) was received 10 September. This appeal was not addressed to the Chief of Engineers as required by the aforementioned paragraph 1-11 for which reason the subconstructor was orally requested to submit an appeal addressed to the Chief of Engineers. This revised appeal dated 29 September 1945 was received 3 October 1945."

This is signed, or rather, the name is written on this copy with typewriter "Homer D. Thomas, Major Corps of Engineers, Contracting Officer." There is a certification at the bottom, "A certified true copy, Marion E. Olson, Administrative Assistant."

The Court: I want to ask in what way this is material?

Mr. Watts: In the brief I have filed I have submitted no less than six cases where the Court is bound by findings of fact, but not by conclusions of law, and that these findings of fact in these decisions, I will agree,—

The Court (Interposing:) What is the use of me trying the case if I am bound,— [264]

Mr. Gibson: If the Court please, at this same point, so far as the defendant is concerned, let me say that the cases cited by counsel refer to a situation in which there is a question of penalty against the subcontractor for a violation of his contract, and that in the cases which we will cite in our brief the decisions go to some length in discussing this question.

The Court: I think I will admit the exhibit.

Mr. Gibson: And is that with our objection?

(Testimony of W. Lyle Borst.)

The Court: Yes; and I don't mind saying that this matter is entirely new to me, and I don't want to rule hurriedly on it. I will accept the exhibit, but subject, of course, to your objection, and subject to a motion to strike with the same force and effect as if the motion were made at this time.

(Whereupon Plaintiff's Exhibit 45 for identification, was admitted in evidence.) [265]

Mr. Watts: In connection with the reading of Exhibit No. 44, which I completed last night for the record, I want to call the Court's attention to page three, and clause four, in which the Contracting Officer found that some of the material was missing, and that it was not delivered until forty days late, that is, that it was forty days late being delivered.

Mr. Gibson: I didn't hear that, Mr. Watts.

Mr. Watts: I called the Court's attention to page three and to clause four on that page wherein there was a finding that some of the material was missing and that some of the material was not delivered for forty days, that is, it was forty days late in being delivered, and also [273] I want to call the Court's attention to page five of Exhibit No. 44, and clause nine, wherein it was found that there was an error in the water-wall headers and that this error caused a delay, and I want to call the Court's attention to clause No. 10 on page No. 5 of the exhibit wherein it was found that the delay

(Testimony of W. Lyle Borst.)

in the delivery of water-wall tubes for Boiler No. 3 caused a forty-one day delay.

Mr. Watts: Now, that brings us to the matter of damages.

Q. In this suit what is the basis for your claim for damages?

A. For additional costs which we were forced to go to in completing this work over and above that which we would have been put to had we had the material in proper time.

Q. What are the elements of the difference above the actual cost of performance, and what it would have cost if the material had been on hand and there had been no delay?

A. The additional cost of the supervisory personnel, the additional equipment required for performing the contract.

Q. And what do you mean by that?

A. Well, air compressors, and such things—

Q. (Interposing:) Do you mean the equipment, or the rental of it—the rental of the equipment and additional labor involved from the prescribed labor?

A. The additional labor involved from the prescribed labor, and the office overhead at the home office, and some of the field charges, and for my own time.

Q. Have you made a schedule covering in detail each of the items and component parts of each of these items for introduction in evidence in this case?

A. Yes, sir. [278]

(Testimony of W. Lyle Borst.)

Q. For how many days is your computation under this schedule of damages made?

A. Thirty-nine days.

Q. In what important respects does the present computation of damages differ from the claim for damages that was ultimately submitted to the Chief of Engineers?

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness and is an attempt to obviate, or eliminate, the limitation on his own claim which was previously filed.

The Court: I will admit it subject to your objection. If the Court later determines that the plaintiff is bound by the settlement, I will not permit it, and of course I would not permit the plaintiff to increase its claim.

Mr. Gibson: And the Court would probably hold in that event they are not permitted to have damages under the contract?

The Court: That is a matter for later determination. I will admit this at this time, as I stated.

Q. (Mr. Watts, continuing:) Exhibit No. 65, will you please identify that?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 65, for purposes of identification.)

A. That is a computation of the various items—

Q. (Interposing:) Does it comprehend the five elements that you have mentioned?

A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. And the first item, what is that?

A. That is the cost of the equipment—the rental cost.

Q. How much are you claiming for that item?

A. \$2,255.50.

Q. Will you explain to the Court what you mean by this item?

A. This is the various items of equipment which were used in connection with this work, and they were maintained on the project for a thirty-nine day period over and above that which would have been necessary had we been able to complete in the one hundred and twenty day period.

Mr. Scholz: We object to it as it calls for a conclusion of the witness, and it is a conclusion where he states “over and above the time necessary to complete.” That is purely a conclusion.

Q. (Mr. Watts, continuing:) In order to obviate that objection, let us put it this way: Tell the Court whether it covers the cost of the rental of equipment for that period between November 10th, which was the date your contract was to have been completed, and December 19th, 1944, the date on which the contract was completed? [280]

Mr. Gibson: We object to that. It is predicated on hearsay. We have here a prepared summary, and the person who prepared it has not been established, and we have nothing to check against.

The Court: Well, it certainly would not be the basis for any damages unless it was shown that this equipment was not being used in any way, that

(Testimony of W. Lyle Borst.)

the equipment was idle on account of the delay. That would be the question. If it was used at all it would be hard for the Court to determine what the value was.

Mr. Gibson: That is a factor overlooked, and that is that he put on as many shifts as possible to work, and that they worked on Sunday and overtime. It certainly is not our fault if they spread this work out and did not get it finished on time.

The Court: I will consider all of your objections.

Q. (Mr. Watts, continuing:) Now, tell the Court whether this computation of the rental on this equipment was for the period of November 10th to December 19th?

Mr. Gibson: I object to it as hearsay and this is not an original record from which we can determine what the rental was.

Mr. Watts: I will introduce the original records.

The Court: It may be admitted subject to the connecting up of it, and of course, subject to your objection. [281]

A. This is a schedule for that rental period.

Q. (Mr. Watts, continuing:) Are you responsible for this schedule for rental, Mr. Borst?

A. It was prepared under my direction.

Q. Do you know that each item listed under Item No. 1 on the schedule, or, rather, on Exhibit No. 65, was at the site and unused during the thirty-nine day period? A. Yes, sir.

Q. On this Exhibit 65, for example, opposite the name of the equipment the first item "Air compres-

(Testimony of W. Lyle Borst.)

sor, one Gardner-Denver two-stage 210 foot piston displacement," you have set opposite that the monthly rate of rent on this equipment?

A. That is right; yes, sir.

Q. And there is shown opposite that the rental covering that piece of equipment for the thirty-nine day period? A. Yes, sir.

Q. In this exhibit No. 65 have you specified each of the pieces of equipment which were rented by you from others, or was owned by you, upon which you are claiming the right to recover during this period of thirty-nine days? A. Yes, sir.

Q. Will you tell the Court, please, one of the sources from which this unit rate per month was chosen?

A. From the O.P.A. rental schedule. [282]

Q. Are any of these rental charges in excess of the maximum price regulation No. 134 of the Office of Price Administration then in force?

Mr. Gibson: We object to that as calling for a conclusion of the witness, and attempting to have him incorporate the regulation of the O.P.A.

The Court: The Court will take judicial notice of the O.P.A. regulations.

Q. (Mr. Watts, continuing:) State whether or not, independent of the O.P.A. regulations of the rental price, whether or not in your opinion the price on this schedule for the rental of each piece is, or is not, reasonable.

A. It is my opinion that they are reasonable.

(Testimony of W. Lyle Borst.)

Q. Tell the Court whether or not the total sum for which you make claim in the amount of \$2,255.50 is, or is not, reasonable for the rental of the equipment designated in Exhibit No. 65 for this thirty-nine day period.

Mr. Gibson: We object to this unless it is conceded that the objection previously made that all of this evidence is incompetent, irrelevant and immaterial to all of the Counts, and the further objection that it is inadmissible on the ground that they have previously filed their claim and signed their receipt in the total sum of \$10,008.70.

The Court: The objection will be noted, and it is conceded [283] here that it goes—your objection goes to all of the question of damages. This will be admitted. [283-A]

Mr. Scholz: May it be stipulated that every statement he makes regarding damages that were objected to before, may be **objected to now, and** that under the contract he is not entitled to damages?

The Court: That will be all covered in the final decision of this case. This case seems to simplify itself into one or two vital points. The first question for the Court to decide is whether the contract is plain and can be declared as it is written. If the Court decides that, then Counts two and three necessarily fall. And the next question is whether if the contract should be interpreted as written, whether there is any consideration for the last

(Testimony of W. Lyle Borst.)

clause. If there was no consideration, then plaintiff's case fails, and if the Court determines that there was a recoverable damage, or damages, on account of these delays the question is whether the damage can be enlarged over and above the claim filed by the plaintiff.

Mr. Gibson: Of course, the Court is carrying in mind the matter of delay, that it alone is not a question of damages. There must be connected with that the matter of negligence.

Mr. Scholz: And even with the clause added to the signature page, we contend there is nothing added to the contract. [284]

The Court: If the Court finds that it is a part of the contract then, of course, it is very plain to the Court.

Mr. Scholz: Not according to our contention.

The Court: This is still in its early stages, I take it. This is only the first witness in this lawsuit.

Mr. Scholz: If your Honor decides that there was consideration for the clause on the signature page, we still contend that it does not give the right to the plaintiff to sue for damages.

The Court: That seems to me a rather unusual statement, but I will consider it. You may go ahead.

A. The question was, Was this a reasonable charge? And in my opinion it is a very reasonable charge.

Q. (Mr. Watts, continuing:) Now, I wish you

(Testimony of W. Lyle Borst.)

would turn to Exhibit 32-1, 32-2, and 32-3. In that exhibit, which is in evidence, will you tell the Court whether or not these expenses include the receipted bills or invoices for each and every item to which you have testified that you want damages for in Exhibit 65, covering this thirty-nine day period of rental?

A. Yes, sir; these invoices cover the charges.

Q. Have these invoices actually been paid by the Power Service Corporation? [285]

A. Yes, sir; they have.

Q. Will you tell the Court whether or not it was necessary for all of these items which are listed under "Item One," on Schedule 65—or, rather, Exhibit 65, to be on the job for this thirty-nine day period?

Mr. Scholz: Now, that calls for a conclusion and we object to it.

The Court: He may answer.

A. Yes, sir; this was all used as is all contracting equipment from day to day for the work, possibly not at one place day after day, in one particular portion, but a portion of work may be performed today, and again the day after that, or the third day, but it was all in there ready for the work.

Q. And was it necessary to keep that equipment on the job to perform this contract?

A. Yes, sir; it was.

Q. Item 2, what does that cover, Mr. Borst?

(Testimony of W. Lyle Borst.)

A. Item 2 is the extra cost of supervisory personnel except Borst.

Q. You are claiming how much for that item?

A. \$8,267.53.

Q. Will you explain that item to the Court, if you please? [286]

A. Yes, sir.

Mr. Gibson. Do I understand that we must make objection to each question now?

The Court: Yes; that is right.

Mr. Gibson: I object, and move to strike this, as incompetent, irrelevant and immaterial, and not payable under the terms of the written contract. It is an attempt to exceed or add to their own established agreement, beyond this \$10,000.00.

The Court: It may be admitted, subject to your objection.

A. May I ask you the question? I don't remember just how this was set up.

Mr. Gibson: Why, don't you just read it, counsel, and save the witness that trouble.

The Court: Just go ahead.

A. These are the names of the supervisory personnel involved, and it gives the base weekly rate, and the exact amount as paid to these men for the exact thirty-nine day period.

Q. (Mr. Watts, continuing:) Will you explain what you mean by "supervisory personnel," and the names of the men appearing under this item?

A. The names are listed; Emil Nelson, general superintendent; [287] O. G. Thornzsen, piping sup-

(Testimony of W. Lyle Borst.)

erintendent; James A. Hobbs, boilermaker superintendent; Ray B. Shaw, purchasing agent; E. W. Ross, chief clerk; James P. Kreitzer, senior clerk; Jack L. Wright, junior clerk; Harvey Precht, general boilermaker foreman; Fred M. Godsoe, general piping foreman; Thra S. Moor, material control; Clifford S. Boyle, general millwright foreman.

Q Were each one of these men a part of your field organization entirely independent of the labor organization as such? A. Yes, sir.

Q. Will you state whether or not these men were required to be on the job during the performance of this contract, during the thirty-nine day period from November 10th to December 19th?

A. They were required for that period of time; yes.

Q. Have you set forth in the schedule in Exhibit No. 65, under Item 2, the exact amount that was actually paid to each of these employees during the thirty-nine day period? A. Yes, sir.

Q. Do you have in the Courtroom and available for inspection of counsel the original payrolls showing that they were actually paid this amount, and do you have the endorsed checks from each of these employees showing the payment of these [288] wages?

A. Yes, sir; we do have.

Mr. Watts: Unless it is required on cross examination, the plaintiff does not introduce the payrolls and checks for the reason that we take the position that they would only unnecessarily en-

(Testimony of W. Lyle Borst.)

cumber the record. However, if there is any question about the authenticity of the exhibit marked 65, we have the checks and the payroll to be marked as an exhibit, if it is desired.

Mr. Gibson: I am not making an objection on that ground. I am not questioning that, Mr. Watts, but I do have my objection in to the exhibit, or schedule, which has been marked as Exhibit 65. I don't object to its being shown by 65, if it was admissible.

The Court: In order to save the objections being repeatedly made, I will say that a general objection as to any testimony as to any claim that enlarges the amount over the claim filed will be deemed to be objected to.

Mr. Gibson: Why can't we have the objection in reference to damages throughout this testimony? It is not payable, under our theory. It would be incompetent, irrelevant and immaterial, and, as I say, under our theory it is not payable under this contract, under any circumstances.

The Court: It is agreeable to the Court that you [289] may have your objection.

Q. (Mr. Watts, continuing:) Will you state whether or not the wages for the supervisory personnel were actually incurred in the amount of \$8,267.53?

A. Wages and payroll taxes and social security; yes, sir; and there was also some expense claims in that.

(Testimony of W. Lyle Borst.)

Q. Will you give us the expense items included in this supervisory personnel item?

A. There was Mr. Ross, Mr. Thorndsen, and Mr. Nelson. We paid Mr. Ross \$186.13; Mr. Thorndsen, \$172.77; and Mr. Nelson \$458.22. That was for the expenses in that period.

Q. (Mr. Watts, continuing:) Under Item No. 2 of this schedule, in addition to the actual payroll on these supervisory men, you have just testified to the fact that you paid them certain expenses. Now, will you tell the Court how those expenses were taken care of?

A. By petty cash vouchers paid in the field.

Q. Did you require each man to show each item of expense that he expended before you reimbursed him?

A. Yes, sir. [290]

Q. Did you issue a check for each bill submitted by the employees?

A. Yes, sir.

Q. Did you have, or do you have, each of the bills to each itemized statement, and each voucher to establish the expenses, that is, for instance, the expense of Emil Nelson in the amount of \$458.22 during that period?

A. Yes, sir.

Q. And do you have the expense vouchers, statements and receipts for each and every employee mentioned on Item No. 2?

A. Yes, sir.

Q. The last item there, amounting to \$286.55 on Item No. 2 of the schedule, what does that represent?

A. That is the payroll taxes and social security payments to the Government.

(Testimony of W. Lyle Borst.)

Q. On the wages of these men enumerated in Item 2? A. Yes, sir.

Q. The total items as listed on supervisory personnel is how much? A. \$8,267.53.

Q. What is the third item of expense?

A. That is an item for additional time for myself on the project, covering the ninety day period, and the expenses [291] for that ninety days.

Q. What are your duties in the Power Service Corporation at Minneapolis?

A. I had the responsibility of getting new business and supervising the business that is obtained.

Q. Is there anyone else in your organization that is charged with the responsibility, or assumes the responsibility or did so during the one hundred and fifty-nine days at the Sunflower Ordnance, that is, with getting new business for your organization?

A. No, sir; that is my responsibility.

Mr. Gibson: I move to strike what his duties are in procuring new business. There certainly is no part of this under the contract.

The Court: The answer is in the record, and it may stand.

Q. Did you have other contracts at the time this was running? A. Yes, sir.

Q. At the present time how many do you have running, Mr. Borst?

A. In the neighborhood of twenty contracts.

Q. Has it been necessary for you to get on the job at the commencement and stay there in the

(Testimony of W. Lyle Borst.)

capacity of more or [292] less a project manager for the full period of performance?

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and not within the issues, whether he spent five minutes there, or the whole time. He was under contract to do this work.

The Court: He may answer.

A. On one other occasion we went out and designed and constructed a plant, and I did spend a period of time there.

Q. Is that the only instance?

A. Yes; it is.

Q. What are your ordinary duties with respect to performing a contract such as this, so far as the normal amount of time you spend in the performance of the contract?

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and not within the terms of the contract, and certainly not binding on the defendant.

The Court: He may answer.

A. Normally, I would spend the amount of time there necessary to get it under way.

Q. To whom would you turn the responsibility of managing and performing of the contract from then on out?

A. The general superintendent.

Q. And that was whom?

A. That was Emil Nelson. [293]

Q. Now, how much time would it have been necessary, in your opinion, for you to have spent on

(Testimony of W. Lyle Borst.)

this project had not these delays to which you have testified occurred?

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and also calls for a conclusion of the witness.

The Court: He may answer.

Mr. Scholz: And may we have the further objection that all damages must be within the contemplation of the parties to the contract. They are alleging a breach, and they could not get any damages unless it flowed from the breach of the contract, outside of special damages which must be distinctly pleaded, and they are bound by that.

The Court: He may answer.

A. About thirty days.

Q. You are submitting a claim under another item for a proportionate part of your salary for the thirty-nine day period? A. Yes, sir.

Q. Out of this one hundred fifty-nine days, tell the Court how many days you spent on the job that you would not have been required to spend had it not been for the delays?

Mr. Scholz: Objected to as incompetent, irrelevant [294] and immaterial, and calling for a conclusion of the witness, and not within the terms of the contract. He was there to perform a definite contract, and this is not admissible.

The Court: He may answer, subject to the objection as to the damage phase.

A. Ninety days.

Q. You would not have been required to spend

(Testimony of W. Lyle Borst.)

that ninety days had the materials been available for the erection of these units?

A. That is right.

Q. What was the actual weekly wage rate,—what were you paid during that period?

A. One hundred dollars a week.

Q. Was that for wages? A. Yes, sir.

Q. How much did that amount to for ninety days? A. \$1,285.71.

Q. What else besides your wages did you receive?

A. Expenses. They were \$1,256.60.

Q. Tell the Court generally what those expenses were.

A. They were hotel expenses, meal expenses, car expenses, driving from Kansas City to the Sunflower Ordnance Project each day, traveling expenses to and from the work, and petty [295] cash.

Q. Were those expenses enumerated in Exhibit No. 65 under item 3,—strike that, please. Let me put it this way, Mr. Borst: Were the expenses enumerated in Exhibit No. 65 under Item No. 3 actually expended by you in the performance of this contract? A. Yes, sir.

Q. During this ninety day period?

A. Yes, sir.

Q. Were you reimbursed for the expenses in this amount? A. Yes, sir.

Q. Do you have in the Courtroom and available for inspection by the Court and counsel an itemized statement for each expense item that you turned in

(Testimony of W. Lyle Borst.)

during this ninety day period, together with the receipted bills and vouchers from the Power Service Corporation in payment of these expense items?

A. Yes, sir.

Q. So that the total amount you are claiming under Item No. 3 for time and expense is how much? A. \$2,542.31.

Q. Was all of this paid to you and received by you from the Power Service Corporation? [296]

A. Yes, sir.

Q. Was it necessary and reasonable as expenses that were incurred by the Power Service Corporation during this ninety day period so far as the wages and expenses were concerned?

A. Yes, sir.

Mr. Scholz: We object to that as calling for a conclusion of the witness as to "necessary expenses."

The Court: The answer is in the record, and it may stand.

Q. (Mr. Watts, continuing:) Now, what is the next item of expenses there?

A. Home office overhead.

Q. How much are you claiming as damages for home office overhead? A. \$6,649.82.

Q. Will you tell the Court what other jobs you had in progress during the thirty-nine day period between November 10th, 1944, and December 19th, 1944.

A. Well, we had a project for the Board of Heating Commissioners of the city of Sleepy Eye, Minnesota.

(Testimony of W. Lyle Borst.)

Q. What else?

A. A project for the Union Pacific railroad company.

Q. Where?

A. Salt Lake City, Utah. [297]

Mr. Scholz: Now, we have an objection to that. Besides our general objection I want the further objection that any other project they might have would certainly not be binding on this defendant, that is, any testimony regarding any other project, and is not any element of damages here.

The Court: Yes; that is true, if it is for that purpose, but I don't know yet what the purpose of this is.

Mr. Watts: The purpose is to allocate to the home office the overhead for this job, that is, the particular portion of the overhead for this job.

The Court: It is your contention that he was looking after this project?

Mr. Watts: No; not exactly. I wouldn't put it that way. I would say the company was performing these various projects at that time.

The Court: I will admit it subject to the objection in the record.

Q. (Mr. Watts, continuing:) What was the total contract price for the Sunflower Ordnance project?

A. \$466,821.07.

Q. What was the contract for the Board of Heating Commissioners at Sleepy Eye?

A. \$15,956.00.

(Testimony of W. Lyle Borst.)

Q. And what was the contract for the Union Pacific at [298] Salt Lake City, Utah?

A. \$80,740.00.

Q. What was the average number of employees between November 10th and December 19th, 1944, at the Sunflower project?

A. The average was eighty-nine employees.

Q. What was the average number of employees at the Sleepy Eye job? A. Four.

Q. What was the average number of employees at Salt Lake City on that contract?

A. Eighteen.

Q. What was the total average number of employees during the thirty-nine day period on the three jobs? A. One hundred eleven.

Q. What was the total contract price of the three jobs, that is, of the jobs at the three sites?

A. \$563,517.07.

Q. What was the annual overhead as shown by the books of your company? A. \$75,316.58.

Q. And what was the average monthly overhead for 1944? A. \$6,276.38.

Q. Have you made an allocation of your monthly overhead [299] of this job, taking into consideration, first, the element of the contract price, the relationship between the Sunflower contract and the total being performed by you at that time, and taking into consideration the relationship of the average number of employees at the Sunflower project to the total number of employees during that thirty-nine day period? A. Yes, sir; I have.

(Testimony of W. Lyle Borst.)

Q. And what percentage of the allocation, using the contract price, as a basis for the allocation? Can you answer that, Mr. Borst?

Mr. Gibson: We object to this. This witness may be an expert as an engineer, but not as an accountant. He is attempting to show what this overhead is. Why didn't they submit a financial statement instead of having this witness testify as an accountant and an engineer, and everything else?

Mr. Scholz: And I want to add to that objection: That this cannot give any reasonable basis. It is too vague, and subject to many different propositions to make it clear enough for this Court to decide that it is the correct amount.

The Court: At this time that objection will be sustained.

Mr. Watts: I will say, your Honor, that we will subsequently offer a deposition of Mr. Gaffney, the treasurer [300] of the plaintiff corporation, in which the items that are being used for a basis of this computation are testified to, and on this basis I offer to prove that by using the contract price as a basis in allocating the overhead the percentage amounts to eighty-three per cent, and that by using the number of employees as a basis for the allocation the percentage which this contract had to bear of the home office overhead is eighty per cent, and then by averaging the two different items, the contract price and the number of employees, which is eighty-three and eighty, dividing that by two would give the average allocation of eighty-one and one-

(Testimony of W. Lyle Borst.)

half per cent, which would have to be applied against this contract if the finding is in favor of the plaintiff, and I will say to your Honor that I have cited cases in my brief in which this specific type of testimony was held to be admissible.

Mr. Gibson: I am not questioning the type of testimony, but I am questioning the source of it at this time.

The Court: Yes; I do not think that he has shown himself qualified to testify, if there is better evidence available at this time.

Q. (Mr. Watts, continuing:) What formula did you apply in reaching the amount of home office overhead which [301] you say is \$6,641.82?

Mr. Scholz: I think that amounts to the same question as the Court has just sustained an objection to.

The Court: The testimony shows that this man is an engineer, the supervisor of a plant, and this question goes to the amount of overhead, which no doubt are all matters of record. It might be that his testimony would be admissible later, but at this time I think he is not qualified, so far as the record shows now.

Q. (Mr. Watts, continuing:) Do you know, Mr. Borst, as a matter of fact that your company had overhead in excess of \$75,000 during the year 1944?

Mr. Gibson: That is objected to as incompetent, irrelevant and immaterial. This man is not an accountant.

Mr. Watts: I will withdraw that question.

(Testimony of W. Lyle Borst.)

Q. Is this Power Service Corporation completely operated under your guidance and supervision in Minneapolis? I will ask you if in the Home Office you are the man who handles all of the business?

A. Yes, sir.

Q. Do you know, independent of any book record, how much the overhead is,—after you refresh your memory, are you willing to testify that your company pays that amount of overhead? [302]

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial, and calling for a conclusion.

Mr. Scholz: And, furthermore, I don't think the witness is qualified.

The Court: Well, we will see if he can answer.

A. We have a tax statement available which gives that information.

Mr. Gibson: Are you offering that tax statement?

Mr. Watts: Yes.

Mr. Scholz: You never prepared that, did you, Mr. Borst?

A. No.

Mr. Scholz: And had nothing to do with preparing it?

A. Not in setting down the figures.

Mr. Watts: I wonder if I may go on with my examination?

The Court: Yes; you may go ahead.

Q. (Mr. Watts, continuing): Was this sworn to by officers of the Power Service Corporation as a

(Testimony of W. Lyle Borst.)

part of its records which it submitted to the United States in respect to income taxes for the year 1944?

Mr. Scholz: We object to that testimony, because the evidence of the officer himself would be the best evidence. To have this witness testify to something that the [303] treasurer of the company could better testify to, is hearsay and would be incompetent.

Mr. Watts: Of course, I cannot get all of this testimony in at once, and I offer this at this time to show the overhead which the company paid.

The Court: The objection will be sustained at this time.

Mr. Watts: The plaintiff offers at this time, and will renew the offer at the proper time later, but now I offer to prove that the formula as it appears in Exhibit No. 5, in arriving at the allocation of the home office overhead was to take the monthly overhead for a month in the year 1944, multiply by eighty-one and one-half per cent, which was the average of contract price and employees, and multiply that by one and three-tenths, which was the time involved here,—one and three-tenths months, or thirty-nine days.

Mr. Gibson: Now, I shall object to counsel testifying in this case.

The Court: I don't think he is testifying, Mr. Gibson. He is making an offer of proof. I understood him to say he was going to make an offer of proof, and would renew the offer later, if it was refused.

(Testimony of W. Lyle Borst.)

Mr. Watts: That is right. We offer to establish [304] at this time that the formula that was used in arriving at the amount of overhead applicable here is that we took the monthly overhead, \$6,276.38. We arrived at that by dividing the total overhead by twelve, multiplying that total by a percentage of eighty-one and one-half, which is a combination of the two percentages, eighty-three and eighty, the price of the contract, and the number of employees, and multiply that by one and three-tenth months, or thirty-nine days, which covers the period here, and arrive at the overhead,—or gives us the overhead of \$6,649.82, out of the total amount of overhead, and that amount is applicable to this contract.

The Court: You may proceed with your proof in accordance with your offer.

Mr. Watts: And do I understand that the Court is excluding No. 66?

The Court: At this time.

Mr. Watts: Very well.

(Whereupon document referred to was marked Plaintiff's Exhibit 66 for purposes of identification.)

Q. (Mr. Watts, continuing:) Now, will you tell the Court how you have arrived at the sum of \$6,649.82, as home office overhead?

Mr. Gibson: I shall object to this on the grounds [305] stated.

The Court: The Court ruled that this witness was not qualified to testify as to the other question, but proof was offered by counsel which I think

(Testimony of W. Lyle Borst.)

makes it competent at this time. I believe I will allow the witness to answer.

A. \$75,316.58 was the annual overhead in 1944, as shown by the plaintiff's books, and that is divided down to arrive at the monthly overhead by dividing that total by twelve, and that gives the figure of \$6,276.38.

Mr. Scholz: Are you reading now from papers that were prepared by you?

A. Yes, I worked this out.

Mr. Scholz: Did you prepare that?

A. It was worked out under my direction.

Mr. Scholz: Did you prepare that?

Mr. Watts: Do you mean, did he make this tabulation sheet?

A. Yes; I set these figures down.

Mr. Scholz: From what records?

A. The over-all figure of the overhead was taken from the accountant's figures and the tax records.

Mr. Scholz: Then they are predicated on the accountant's figures?

A. Yes, sir.

Q. (Mr. Watts, continuing:) What is the figure of the [306] contract price of the Sunflower project?

A. \$466,821.07 on the Sunflower Ordnance project.

Q. What is that based on?

A. The basic contract price plus the three modifications.

(Testimony of W. Lyle Borst.)

Q. Is there evidence here showing that was the contract price? A. Yes, sir.

Q. What was the average number of employees during this period, November 10th to December 19th? A. Eighty-nine.

Q. Do you have the payroll records to establish that these were the actual numbers of employees during that period of time? A. Yes, sir.

Q. Do you know what the contract price of the Sleepy Eye project was? A. Yes, sir.

Q. And what was that? A. \$15,956.00.

Mr. Gibson: We object to this as not the best evidence.

Mr. Watts: We have the contract here with us if you want that? [307]

The Court: If there is an objection I presume that is the way to prove it.

Q. (Mr. Watts, continuing:) Handing you Exhibit No. 68, I will ask you to identify it for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit 68 for purposes of identification.)

A. That is the agreement between the Power Service Corporation and the Board of Heating Commissioners of Sleepy Eye, Minnesota, and it is dated the 26th day of September, 1944.

Q. Showing the contract price of that contract?

A. Yes.

Q. And what is that price? A. \$15.956.00.

(Testimony of W. Lyle Borst.)

Q. Handing you now Exhibit No. 69, will you identify that for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit 69 for purposes of identification.)

A. That is the contract between Union Pacific Railroad Company and the Power Service Corporation, and that is dated the 27th day of April, 1944.

Mr. Watts: We offer in evidence now Exhibits Nos. 68 and 69.

Mr. Scholz: We object to these on the grounds [308] upon which the Court sustained an objection heretofore made, and upon the further grounds that it was not within the contemplation of the parties, and if there was a breach it is too vague and conjectural to be of any assistance to the Court.

The Court: It may be admitted, subject to your general objection.

(Plaintiff's Exhibits 68 and 69, for identification, were received in evidence.)

Q. (Mr. Watts, continuing:) Now, have you taken and added together the total amount of the contract prices on these three jobs in arriving at the figure of \$563,517.07 in order to make a computation of the allocation of home office expense to this particular job? A. Yes, sir.

Q. Does that computation appear under item No. 4 of Exhibit No. 65? A. It does; yes, sir.

Q. Now, Mr. Borst, proceed with the explanation to the Court as to the formula used in arriving at the overhead.

(Testimony of W. Lyle Borst.)

A. The amount of overhead which was obtained from the records of the company in the amount of \$6,276.38 we have used as a basis, and multiplied that by eighty-one and one-half per cent, which represents the portion of the Sunflower allocation against the total overhead of the company, and that, again, we [309] have multiplied by one and three-tenths, which is one and three-tenths months, or thirty-nine days, and that gives us \$6,649.82.

Mr. Scholz: We object to that as it is all predicated,—I will withdraw that,—may I ask the witness a question?

The Court: Yes, you may do that. [310]

Mr. Scholz: Is that predicated on the books and records of the company?

A. Yes, sir.

Mr. Scholz: And upon the accountant's statement?

A. Yes, sir.

Mr. Scholz: We object to it as it is predicated on figures and matters not before the Court, and it is not the best evidence.

Mr. Watts: He has introduced certain contracts and he now goes right on with the computation based on those figures.

The Court: His testimony is in no better condition now, except that these two contracts are in evidence. The objection is sustained.

Mr. Gibson: And the motion to strike is granted?

The Court: Yes, it is granted. He has testified from the books of the company now.

(Testimony of W. Lyle Borst.)

Mr. Watts: I would like him to confine his testimony as to the manner in which it was computed by him, and then I will show the amounts by other witnesses.

The Court: I think you should qualify this witness.

Q. (Mr. Watts, continuing:) You are able to add the total cost of the three contracts together, so far as the computation is concerned? [311]

A. Yes, sir.

Q. And you have before you the amounts that were received by the Power Service Corporation for these three contracts, do you not? A. Yes, sir.

Q. You know independently of the records yourself that these amounts were received by the Power Service Corporation for the contracts performed during this thirty-nine day period?

A. Yes, sir.

Q. You know of your own knowledge that the number of men you testified to were actually employed by the Power Service Corporation during this period of time? A. Yes, sir.

Q. Taking these figures into consideration, have you yourself made this calculation to which you are testifying, Mr. Borst? A. Yes, sir.

Q. Is it your opinion that the proportion of the home office overhead based upon your knowledge of the company's affairs and your position with the company,—is it your opinion that the proportion of eighty-one and one-half percent of the total overhead should be the allocated cost against the Sun-

(Testimony of W. Lyle Borst.)

flower Ordnance contract, and is that a reasonable allocation, in your opinion? [312]

A. Yes, sir.

Mr. Gibson: Now, we object to this. It is the opinion of an engineer as to an accountant's problem.

The Court: I cannot believe that the witness understood your question, Mr. Watts. The witness testified that he knew the cost of this project, and the number of men of his own knowledge, independent of the records.

A. I meant to testify, your Honor, that I knew we had received the amount of \$15,956.00 on the Sleepy Eye contract.

The Court: You knew that independent of the books and records of the company?

A. Yes; I was present at the meeting at which that money was collected. I was there and made settlement in that case. I was at the Council meeting at which we said, "Is the job satisfactory?" and they said, "Yes." And the amount was approved for payment.

Mr. Gibson: When did that meeting take place?

A. In February of the following year.

The Court: If he knows this independent of the records of the company, of course, he may testify. However, it seems almost impossible to the Court.

Q. (Mr. Watts, continuing:) Were you present when this \$15,000 was paid? [313]

A. Yes, sir; I was there when they approved the contract by a minute on the books and a minute that the money would be paid.

(Testimony of W. Lyle Borst.)

Q. Do you know that it was subsequently paid?

A. Yes, sir.

Q. Now, will you tell the Court what you know about the payment of the contract with the Union Pacific Railroad Company as to the time and place?

A. I remember being present in the office when the final payment came in in full on that work.

Mr. Gibson: Will you get the dates, Mr. Watts?

Mr. Watts: Yes; I will do that.

Q. When did that come in?

A. Some time, I think it was in April of the following year.

Q. That would be 1945?

A. Yes, sir; 1945.

Q. Are you willing to testify, Mr. Borst, independent of the records of the company, that is, you will testify yourself independent of any records that the full amount of this contract marked Exhibit 69 has been paid to your corporation?

Mr. Gibson: I have no quarrel with that, Mr. Watts. [314]

Mr. Watts: I may be wrong in my reasoning.

Mr. Gibson: I don't think that he can testify from his own personal knowledge as to the overhead of the office, the home office, for one thing.

Mr. Watts: I think it is a matter of calculation.

The Court: I think we will recess at this time until two o'clock. It is hard for the Court to believe that the witness can testify to matters that he is being interrogated about. However, you may think that over during the recess.

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing:) Before lunch, Mr. Borst, we were discussing your recollection of the amounts involved in certain contracts, and your recollection of the number of men employed, did you mean to say that you knew the exact sum of each contract, without reference to the contract?

A. No, sir.

Q. Do you remember the men employed on each contract?

A. Not without reference, the exact number of men at any one particular time.

Q. Did you compile this document before you referred to the contract documents and the payrolls, or did you refer to them before you made the exhibit? [315]

Mr. Gibson: Now, we object to this. It presupposes something not in evidence.

The Court: I think that is right. The objection is sustained.

Q. (Mr. Watts, continuing:) In the preparation of document which has been marked as Plaintiff's Exhibit No. 65, did you use information obtained from Exhibit No. 2 which is the original contract in this case, together with the three modifications, in arriving at the amount put down in the Exhibit 65?

(Whereupon document referred to was marked Plaintiff's Exhibit 65 for purposes of identification.)

A. Yes, sir; that is true.

(Testimony of W. Lyle Borst.)

Mr. Gibson: The amount of what, is that you are talking about now?

Mr. Watts: The amount of the contract, or the contract price.

Mr. Gibson: I see.

Q. (Mr. Watts, continuing:) Is that the source of your knowledge? A. Yes; it is.

Q. Could you remember that without referring to the contracts themselves, these three contracts that we have discussed? [316]

A. No, sir; not the exact figures.

Q. Where did you get the figures of \$15,956.00?

A. From the contract.

Q. Was that the Sleepy Eye contract?

A. Yes, sir.

Q. And did you mean to tell the Court that you could remember that without reference to the contract?

A. No, sir; I didn't. I had to refresh my memory at the time I wrote it.

Q. Then after you refreshed your recollection what did you do?

A. I transferred that information to the sheets as we were preparing exhibit No. 65.

Q. Now, Mr. Borst, do the figures that you have put down on Exhibit 65 under Item four correctly reflect the amounts involved in these three contracts? A. Yes, sir; these three do.

Mr. Gibson: The figures speak for themselves. I see numerous figures in these exhibits. Now, he is attempting to get in hearsay testimony. He is

(Testimony of W. Lyle Borst.)

attempting to get in evidence that this witness could not possibly know except by hearsay. He has refreshed his memory from the contracts, and that was not objected to. Now, he says, "These figures," and there are a lot of figures in these contracts, and in these [317] various other exhibits.

The Court: Since counsel is not confining this witness to testimony here, or rather to evidence shown by the documents themselves that have been introduced in evidence, I believe he will be allowed to answer.

Q. (Mr. Watts, continuing:) Will you please refer, Mr. Borst,—

Mr. Watts: I think the Court will take judicial notice that the contract price of the Sunflower Ordinance project amounts to \$466,821.07.

The Court: That is in evidence.

Mr. Watts: And I suppose the Court will take judicial notice that the Sleepy Eye contract involves \$15,956.00?

The Court: And that is also in evidence.

Mr. Watts: And that the Union Pacific contract amounted to \$80,740.00?

The Court: And that also was admitted in evidence, as I recall, or, at any rate, there was evidence in the record without objection, as I recall now, as to the amounts, if the documents themselves were not admitted, but it is my impression now that these documents constituting contracts with these various other people are in evidence.

Mr. Watts: I take it I can prove the facts and

(Testimony of W. Lyle Borst.)

[318] the Court can make computations just as well as the witness can.

The Court: I take it that the witness can testify as to the amounts of the contracts in evidence, as to the fact that was the amount that was paid. I think that is in evidence, however.

Mr. Watts: Very well.

Q. (Mr. Watts, continuing:) The total amount of the three contracts is how much?

Mr. Gibson: That is a matter of computation.

The Court: He can make the computation.

A. This adds up to \$563,517.07.

Q. And did you obtain the information as to the average number of employees on the Sunflower project by exactly the same method as you obtained the figures from these contracts, or this particular contract, by reference to your original records?

A. Yes.

Q. Do you have those records?

A. Yes, sir.

Mr. Watts: Will counsel agree that the average number of employees was eighty-nine?

Mr. Gibson: I think there is in evidence here something about the Power Service Corporation having two [319] subcontractors,—at any rate, I think there were two subcontractors. Now, if you will designate with reference to the average number, whether they were directly employed by the Power Service Corporation?

Mr. Watts: No, I don't believe it takes that into account.

(Testimony of W. Lyle Borst.)

Mr. Gibson: You think it does not show them?

Mr. Watts: I think not.

Q. (Mr. Watts, continuing:) Will you tell the average number of employees without taking into consideration any subcontract?

A. This figure that we have set up here of eighty-nine employees is the average of the Power Service Corporation employees, exclusive of any subcontractors.

Q. What about the average number of the Board of Heating Commissioners Sleepy Eye contract?

A. That is just our own employees.

Q. And how many was that?

A. That was four.

Q. And how many were there under the Union Pacific contract? A. Eighteen.

Q. Your own employees? A. Yes. [320]

Q. And the total during that period was how many?

A. That adds to one hundred eleven.

Q. I want you to develop for the benefit of the Court what you did in that computation,—did you take each of the items and make an allocation of the proportionate amount of the cost, the allocations of the percentage of the Sunflower contract with reference to the total amount of the contracts involved in arriving at that certain percentage of the amount involved? A. I did.

Mr. Gibson: If he can understand that question he is all right.

Mr. Watts: What I am trying to do is to show

(Testimony of W. Lyle Borst.)

that we took the two factors in arriving at a fair percentage, first, is the relation of the sum of the three contracts, and we find that the percentage of the Sunflower job was eighty-three; that is, it amounted to eighty-three per cent of all of the work.

The Court: You might show by this witness whether he does have the qualification to make that computation, and then let him go ahead and make it.

Q. (Mr. Watts, continuing:) Mr. Borst, do you know how to compute the relation between the two figures, that is, I will give you this example: If you have the figure of \$466,821.07, and you want to know what percentage that is [321] of the figure \$563,517.07, do you know how to go about making that computation? A. Yes, sir, I do.

Q. And if you want to determine what percentage eighty-nine bears to one hundred eleven, do you know how to compute that? A. Yes, sir.

Q. And when you have gotten those two percentages do you know how to reach the average percentage between the two? A. Yes, sir.

Q. Will you tell the Court what process you used in arriving at the percentage of overhead that should be allocated to this job for the thirty-nine days?

Mr. Gibson: I assume there is not going to be used any figure given to him by anyone else as the proper overhead charge?

The Court: He may answer this question.

A. I made the computation here of the percent-

(Testimony of W. Lyle Borst.)

age of the cost, or, rather, the cost of the contract price of the Sunflower Ordnance project as to the total of the work we had that year at the time, and expressing it percentagewise it is a simple matter of dividing the cost, or the contract price, of the Sunflower Project, which is \$466,821.07, dividing that by the total of the contract price of the three [322] contracts, which is \$563,517.07, which gives you the figure eighty-three, or eighty-three per cent.

Q. Now, go through the same procedure on the number employed, that is, the average number employed on these projects.

A. The average number on the Sunflower Project was eighty-nine, which, divided by one hundred eleven, being the total of all of the employees on the three jobs, gives the figure of eighty, or divided by one hundred, gives eighty per cent, and these two percentages, eighty-three per cent on the price, and eighty per cent on the number of employees, divided by two gives the figure of eight-one and one-half, which is the average percentage.

Q. Now, then, with that in mind,—Strike that, please, Mr. Reporter. You hire all of the employees in the home office of your company?

A. Yes, sir.

Q. And you hire all the employees in the field, that is the key employees?

A. Yes, sir, the key employees, I do.

Q. Are you responsible for getting the contracts? Do you get all the contracts for the company?

A. That is my work.

(Testimony of W. Lyle Borst.)

Q. Do you draw the specifications, or supervise the [323] preparation of the specifications where it is necessary in the performance of a contract?

A. Yes, sir.

Q. Are you charged with the responsibility of performing the contract? A. Yes, sir.

Q. And how about collecting the amount of money due?

A. Well, in this way it is under my supervision: The bills are prepared in the accounting department and go over my desk for checking, and if the collection is not made then it is my duty to follow through and see why it is not received.

Q. Will you tell the Court whether or not in your opinion, Mr. Borst, the percentage of eighty-one and one-half is a fair allocation of the overhead of this job to your overhead in the home office, whatever that might be?

Mr. Scholz: That is objected to as incompetent, **irrelevant and immaterial**, and placing upon this man the responsibility of making an arbitrary determination of accounting problems, and certainly this is not an engineering problem.

The Court: He has testified now as to the percentages and how they are arrived at. He is the superintendent and has been in this work for some time, as I understand it. However, Mr. Watts, you may show what his [324] experience is in making these allocations.

Q. (Mr. Watts, continuing:) Will you tell the Court what type of allocation you made, percentage

(Testimony of W. Lyle Borst.)

wise, in the matter of these contracts, using one of these schedules, for instance, use schedule 53?

Mr. Gibson: I understood the Court to ask about his experience and qualifications?

The Court: That is right. That was my intention, and I thought that is what I did. If he is permitted to show that this is reasonable, he should also show his qualifications to give the opinion.

Mr. Watts: I beg the Court's pardon.

Q. (Mr. Watts, continuing:) Mr. Borst, how long have you been in this business?

A. Since 1925.

Q. Where were you educated?

A. At the University of Minnesota, College of Engineering.

Q. What has been your occupation with this company during this twenty-five years, or the twenty-three year period that I understand you have been with them?

Mr. Gibson: In addition to his other experience, he has said that he does practically everything in connection with the company except the janitor work. [325]

The Court: He may answer.

A. I was with one other company since 1925 for a period of eight years, and then came with the Power Service Corporation as Chief Engineer, and in that capacity I had rather an unique situation,—it might seem rather unusual, but I will explain what my situation is. The Power Service Corporation had been organized before I came, as a sub-

(Testimony of W. Lyle Borst.)

sidiary to the Fegels Construction Company. They had done very little work, but I felt that it would be a very good company to be connected with. I felt that there was a definite advantage even though they had very little work along this line, and I told them, and they said, "What would you do?" and I said I would try to take over this plant work, and work of this kind, managing it, which was foreign to their heavy construction work, and I came in and was given that opportunity by them. I am not an officer of the company, although I do have the burden of operating it. I am given wide authority, much more general in scope than might be taken from my title of Chief Engineer. It is an unusual situation, but, as I say, I do have the burden of carrying on this company entirely.

Q. Are you entirely responsible for procuring all of the business and producing profit and maintaining the business of this company?

A. Yes, sir; I know that if I don't make it that they [326] will just say "I am sorry, but we will carry on our own business."

Q. And in a position such as yours is it necessary to figure the costs on each contract?

A. That is my burden, absolutely.

Q. Do you take into consideration in figuring every contract certain items for overhead?

A. Yes, sir.

Q. And do you allocate that to every job, that is, a certain amount of the overhead, to arrive at

(Testimony of W. Lyle Borst.)

a figure at which your corporation can make a profit? A. Yes, sir.

Q. And have you done that in every case over the twenty-three year period in figuring these contracts?

A. Yes, sir; both for this and the other company.

Q. And is it you, Mr. Borst, that is responsible for the bids submitted by the Power Service Corporation? A. Yes, sir.

Q. And were you solely responsible for the figures submitted on this job? A. Yes, sir.

Q. And did you figure a certain amount of overhead that should be applied to this contract before you could arrive at any profit? [327]

A. Yes, sir; I did.

Q. In making this calculation will you tell the Court ordinarily the method that you follow in allocating the overhead to any given job?

The Court: I think he has already testified to that, Mr. Watts.

Mr. Watts: Very well, your Honor.

Q. (Mr. Watts, continuing:) Now, Mr. Borst, do you consider with the experience you have had that eighty-one and one-half per cent is a reasonable allocation of the overhead to this particular contract for that thirty-nine day period, taking into consideration these factors to which you have testified?

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial. The witness is not qualified as an expert. What he may consider as the

(Testimony of W. Lyle Borst.)

amount of overhead and profit his company should get is not the criterion of good accounting methods. I might figure what a company should make and then I would fix that as reasonable, but I don't think that would be the criterion. Counsel can ask what he did and what he allocated, and I have no objection other than the general objection to that, but I don't think that he should be permitted to testify what is fair.

The Court: I will permit him to answer, and then [328] give it such weight as I shall determine it is entitled to.

A. I feel that eighty-one and one-half per cent is a fair representation of the overhead as reflected in the cost of that part of the work.

Q. Now, Mr. Borst, what is the fifth item upon which you base your total item of damages?

A. That is the item that is due to increased labor costs due to the loss of efficiency.

Q. You have given the Court the loss that your company suffered in excess labor costs so far as the supervisory cost is concerned? A. Yes, sir.

Q. Now is this solely to the cost of labor in performing this contract? A. Yes, it is.

Q. Aside from what you have given the Court?
A. Yes.

Q. You have here all of the payrolls on this job?
A. Yes, sir.

Q. You have the payrolls, not only for the period of July 13th to December 19th, but also for

(Testimony of W. Lyle Borst.)

the amount of wages from July 13th to November 10th?

A. Yes, sir; I have that figure developed in my notes there. [329]

Q. I wish you would refer to your payrolls and your notes in connection with your examination of them and give the Court, please, the total amount of the labor payroll alone, exclusive of the supervisory personnel for the entire job from July 13th to December 19th, 1944.

A. I don't have that break-down exclusive of the supervisory personnel,—no; I don't have that set out.

Q. Well, including the supervisory personnel?

A. That would be to what date?

Q. To the end of the contract.

A. December 19th, 1944?

Q. Yes. A. That would be \$227,418.27.

Q. What was the payroll at the end of the period,—at the date of November 10th, 1944 for both supervisory and labor? A. \$181,467.26.

Q. And the difference between those two figures is how much? A. \$45,951.01.

Q. Are you asking for that recovery, or rather, for the recovery of that difference in this case?

A. No, sir.

Q. How much are you asking the Court for?

A. Under this item, you mean?

Q. Yes. A. \$14,611.72.

Q. Now, Mr. Borst, what does that item of

(Testimony of W. Lyle Borst.)

\$14,611.72,—just in plain words what does it represent,—it is the difference between what?

A. It is the difference between the cost of the work as it obtained,—

Q. (Interposing:) Let me ask you this, Mr. Borst: The actual cost of the work which involved only the erection of boilers No. 1, No. 2 and No. 3, which were repeat processes?

A. The actual cost was \$131,505.47.

Q. From what source did you obtain that computation?

Mr. Watts: I show you a computation now which is Exhibit No. 66.

A. Might I explain that in carrying out this work we kept a daily record of the work of individual workmen, and all that was compiled separately from the accounting office in the home office.

Q. Under whose supervision?

A. Under my supervision at the site, so I was able to determine exactly the amount of the payroll, that is, the amount of money that was expended on repeat operations, and the portion of the work on which the repeat idea might have [331] been expected to obtain.

Q. And have you gone through the records and made this exhibit No. 66? A. Yes, sir.

Q. And have you separated the labor items from the general operation that involves this repeat operation, or these repeat operations in boilers numbered one, two and three? A. Yes.

(Testimony of W. Lyle Borst.)

Q. And is that correctly set forth in exhibit No. 66? A. It is.

Q. Did you prepare Exhibit No. 66 yourself?

A. Yes, sir.

Mr. Watts: We offer Plaintiff's Exhibit 66 in evidence at this time.

Mr. Gibson: I assume it is simply a copy of what he has stated on the stand?

Mr. Watts: No; it is not.

Mr. Gibson: Is this the men out on this job, scattered about the job, or who were working on the erection of the boilers?

Mr. Watts: Only men who worked on the operation of, or, rather, the erection of the boilers.

Mr. Gibson: The erection of the boilers only?

Mr. Watts: Yes.

Q. (Mr. Watts, continuing:) I wish you would make it clear, Mr. Borst, does the labor that you are now talking about cover only a portion of the total labor, or is it the total number of employees employed there by you?

A. That is only a portion. There were other workers in addition to the boiler, piping, and headers, which did not occur in multiple.

Q. Out of this total sum of \$227,418.27, being the total payroll, only \$131,505.47 is properly allocable to your repeat operations?

A. That is right.

Q. Will you tell the Court generally what laborers this \$131,505.47 covers?

A. In the main, it is boilermakers' work.

(Testimony of W. Lyle Borst.)

The Court: The exhibit may be admitted.

(Whereupon Plaintiff's Exhibit 66, for identification, was received in evidence.)

Q. (Mr. Watts, continuing:) Now, in figuring this contract and the price that you had bid on it, will you tell the Court what you took into consideration with respect to the manner in which you would work to erect these three units?

A. This chart has not been prepared with this in mind, [333] but in connection with the operation incident to number one boiler we have shown the normal length of time, or unit required, to be one hundred,—that is up to the red mark here (indicating), which includes one hundred per cent of the work. In that work of putting up this boiler there would be several, independent and separate and distinct operations, such as the erection of the drums, the steel jackets and other phases of the work, that would all be repeated on number two and number three boilers. They would be successive operations under normal procedure. There would be three jobs to be erected in a row, and we would have developed a crew to do a certain phase of that work, we will say, putting up water-wall headers. That crew would complete that particular operation in the first boiler, move on to the second and do again, and move onto the third, and repeat it there, and in a similar manner we would develop a crew for putting in a certain set of tubes. They would do it on the first boiler, move on to the second boiler, and then to the third until the work was all done.

(Testimony of W. Lyle Borst.)

With the successful development of such crews, they would work on all three of the boilers. It would be sort of an assembly line, except that the men would move from boiler to boiler in this case, but with the same idea in mind as an assembly line operation. This represents what we actually [334] experienced, the total length of this bar here, and the proportionate amount of money spent on boiler number one to do all of that erection. We felt that it should have been done, and could have been done in five per cent less than that, or one hundred units, if we had not experienced delays in connection with the operation.

Q. Will you tell the Court what delays you encountered which caused you to take this five per cent more cost than would have been normally the cost of doing the work, if the delays had not occurred?

Mr. Gibson: Now, we object to this. It presupposes a normal amount which has not been shown.

Mr. Scholz: We object to the use of the term or phrase "normal cost." I presume that he was assuming a condition when all of the material was there, and nothing at all would interrupt them in their procedure.

The Court: I will permit him to answer, and the answer so far may stand in the record.

Q. (Mr. Watts, continuing:) What are the delays,—what happened when a delay took place when there was a loss of five per cent, or when it took

(Testimony of W. Lyle Borst.)

one hundred and five units to do the work instead of one hundred units?

A. Well, the work would get to a certain degree of completion, and then the operation would have to be stopped. [335] We might have installed two or three rows of water-wall tubes at one point, and then for the lack of additional tubes we would have to stop. This crew would have to be disbanded then, and introduced into, or taken up by other crews, and there might have been a block and tackle set up to pull this stuff into the air for erection, and that would have to be taken down, and cables would go back to the power hoist to use the hoist, because it had an operator that was using it almost continuously, and there would be delays incident to not being able to go forward with the work for several reasons, and those are the things to which we attributed the five per cent additional, or one hundred and five per cent, or units, actually used.

Q. How much time would be actually lost by a crew when you reached a situation where you had no material to go forward?

A. Well, you could easily use a half day's time in getting organized on another piece of work.

Q. Would you continue to pay these men for that one-half day, from the time they finished one phase of the work until they started on another phase?

A. Yes, sir; we would.

Q. Did you actually pay them?

A. Yes, sir; we did. [336]

(Testimony of W. Lyle Borst.)

Q. How often, or how many times would there be when you had this stoppage of this work?

Mr. Gibson: We object to that. There would be certain stoppages that would be considered at the time of the bid.

The Court: I will permit him to answer.

A. There would be a couple of times in the period of these boilers.

Q. When these stoppages would occur what would be the first step for the foreman to take when he got to the point where the tubes, we will say, were not there? What would the foreman do?

A. He would have to make a survey of the progress and come back to the general foreman and say, "I am caught up. What will I do next now?" and then they would get directions from the tube supervisor.

Q. Who would he come to for his directions as to what next to do?

A. Well, the gang foreman to the boiler foreman; the boiler foreman to the superintendent, and then the superintendent would work the thing out.

Q. And that was who?

A. That was Mr. Hobbs.

Q. And what did Mr. Hobbs have to do then?

A. Well, he was—

Q. (Interposing:) You have the testimony of Mr. Hobbs here in the form of a deposition, do you not?

A. Yes, sir.

Q. What is your judgment, Mr. Borst, as to the

(Testimony of W. Lyle Borst.)

amount of loss in terms of percentage that you suffered on the first operation alone?

Mr. Gibson: I object to that as a conclusion of the witness, and it is dependent on circumstances and variable conditions of operation within the contemplation of the contract, and it is no indication of delay which would be chargeable to a breach. It is the usual hazard of a contract.

The Court: I think possibly you are right, but I will permit it to go in subject to the objection, and to the weight to be given to it later.

A. The five per cent we allowed, in my judgment, was the proportionate amount of time lost in delays.

Q. (Mr. Watts, continuing:) And what, translated into terms of dollars, what did that mean to you?

A. That would represent three or four thousand dollars.

Q. The point I want is whether that five per cent in addition cost your company additional money?

A. Yes; it represents the over-all loss. [338]

Q. State whether or not the first operation, in your opinion, cost one hundred and five per cent of what it normally would have cost your company?

A. That is correct.

Q. Will you state what your opinion is as to what the actual cost was, and what the normal cost should be, on the second operation, and give your reasons for it?

(Testimony of W. Lyle Borst.)

A. On the second operation we had expected to pick up on that from the value of our experience on the first operation. We thought that we could do the work in ninety or less units by virtue of the fact that it was a repeated operation phase.

Q. Why?

A. Because it would be a reasonable determination that the men would accomplish this by virtue of not having to stand around and review the blue prints, for one thing, and another thing, they would be familiar with the material and the exact way to get it into the air to be placed properly, and they would take advantage of every opportunity, and in this way we should have accomplished it in ninety units.

Q. Now, let us assume that the first operation would take one hundred hours, Mr. Borst, what would the second operation normally take, if there had been no delays?

A. It would normally have taken ninety hours.

Mr. Scholz: That is a supposition on your part?

A. No.

Q. (Mr. Watts, continuing:) That is your opinion, isn't it?

A. That is my opinion.

Q. If you could normally have done it in ninety hours, or ninety units of time,—just tell the Court how many units it took in this case to erect the number two boiler.

Mr. Scholz: That calls for a conclusion. He would have to go back to show what men were there, what the stoppage was, and what plans he

(Testimony of W. Lyle Borst.)

had for this work, and where the men went, and when they came back.

The Court: I will admit it, subject to having it connected up. He may answer.

A. In this instance we did not obtain any value from the first operation, that is, we didn't get any advantage between the one hundred and the ninety units. There was no sequence of operation to follow through to obtain that familiarity with the operation that the men required in order to gain the necessary efficiency to do the work in the ninety units.

Q. (Mr. Watts, continuing:) What would happen between [340] this boiler number one and boiler number two with respect to the crews themselves, we will say the crew that performed the operation on the first unit, what would happen to that?

A. Well, this crew, once they had completed this job and were not able to move on by reason of scarcity of materials, they would be broken down and some would go into another crew.

Q. To do what?

A. Well, to do some other work, maybe just one or two of the men would go into another crew, so that the first crew would not be kept in unity for the next phase of the work.

Q. Then what crew was used on the next portion?

A. A crew entirely built up again. There may not be any of the original men in that second crew.

(Testimony of W. Lyle Borst.)

There may have been, and there may not have been, I can't answer as to that.

Q. How many crews were employed on this whole job, that is, during the whole job?

Mr. Gibson: We object to that. He said, "they may, or may not be, the same men." He should have a complete schedule, if that is important here.

The Court: I will permit him to answer, just for what it is worth. I will determine that later.

A. After the matter of being unable to gain any advantage of this repeated operation, we of course had to carry this chart so it would be in conformity with the amount of work that [341] was actually obtained, and some sort of delay had obtained on this first operation that gave rise to the first five per cent loss, and that, in addition to the fact that the second operation should have been accomplished in ninety units, made a total of fifteen per cent loss in connection with the second operation.

Q. Under normal operations you would have completed in how many units of time?

A. You mean the second operation, or boiler number two?

Q. Yes. You would have completed that in how many units of time? A. Ninety.

Q. How many did you actually consume in the second unit? A. One hundred and five.

Q. So that there was a loss of what in percentage? A. Fifteen per cent.

Q. Now then, Mr. Borst, what about the third?

(Testimony of W. Lyle Borst.)

A. Well, we would have picked up the same amount there if we had the same crew going from boiler to boiler.

Q. Assuming what?

A. Assuming that they could move forward from one operation to the same operation that was to be repeated.

Q. You could have completed that in how many units of time? [342]

A. In eighty-seven and one-half units.

Q. How many did it actually take you to complete the third boiler?

A. One hundred and five units.

Q. The same as the other two?

A. Yes, sir.

Q. Why did it take one hundred and five to complete on the third boiler?

A. The same delays did obtain. The loss of the assembly line principle obtained on this operation as it had before, and we were unable to use the same crew which would have gained efficiency by reason of previous operations in that amount.

Q. Did any of this estimated loss of efficiency include any stoppage by reason of simple matters or small matters—let me put it this way: To what have you confined your estimated loss in operation in making this schedule, or table, of loss of efficiency?

A. Entirely to the matter of water-wall tubes and water-wall headers for the boilers, and also to the matter of the drum which was there in error,

(Testimony of W. Lyle Borst.)

and was not our error.

Q. Did the shortages represented by any of these requisitions and any invoices making up Exhibit No. 20 running from No. 1 to No. 84, outside of the shortage of tubes and headers [343] contribute in any way to the loss of efficiency or delay, or do you know?

A. Yes; I know they did not, because that material came in readily.

Q. When did it come in?

A. Well, it came in within the time required. We didn't need to wait for that material.

Q. Did the shortage represented by the 84 requisitions, outside of the missing tubes and headers, in any way contribute to the delay in the construction of these units?

A. No; I am sure it did not.

Q. And—

The Court: Did you have a large turn-over in help on this job? A. No.

The Court: What prevented you from using the same crew on operations number two and three that you used on number one?

A. Well, I can explain it this way to your Honor: Once you get a crew developed and the men going forward on any operation, and then assume that they will finish that operation or that thing they are doing, even though there might have been a complete operation, and there was not a repeat operation ready at the time, then these men

(Testimony of W. Lyle Borst.)

are taken to [344] another crew, and when the work on the second operation is ready, even though one man might be very desirable to be used on that operation, he is tied in here with the second crew and it is hard to bring him back.

The Court: Even with the delay, if you could have transferred back the same crews you would have the same ninety unit efficiency that you have set up on this map, or chart?

A. Yes, sir.

The Court: And if you could have used the same men on operation number three that you used on operations one and two, you would have obtained the eighty-seven and one-half per cent efficiency there?

A. Yes, sir.

Q. (Mr. Watts, continuing:) That would have been on these repeat operations, would it, Mr. Borst?

A. Yes, sir.

Q. And what would the effect of withdrawing these men that were tied up on another job, or another phase of the contract, have on that other phase to which they had been sent?

A. That would have broken that crew, or unit of workmen up.

Q. Was it your purpose to leave this man you mentioned working on something else—was that in your opinion more [345] efficient than bringing him back to this crew on the second operation?

A. Yes, sir.

Q. Throughout the performance of this contract

(Testimony of W. Lyle Borst.)

was it necessary from time to time to make adjustments of that kind in order to operate as efficiently as possible?

A. I am not sure that I understand the question?

Q. Well, you paced the job from time to time?

A. Yes, sir.

Q. What did you mean by that?

A. Yes, sir; we were able to tell, and able to see, that it had reached a certain stage of progress—for example, it was true between this boiler number two and boiler number three, in fact, it was true all the way along, so far as that goes. We had certain materials that were short here, and we knew that we would get it in two or three weeks, by virtue of promises that had been made, and we would be able to take up the work at that time, if we did certain other work, so in the intervening time we had a portion of the work that could be accomplished, and to do this we used the men in steady day to day progress to be reasonably done with the intervening portion of the work so that we could then go on with the work of putting in the material that was short when it did come. [346]

Q. In order to do this, does the schedule introduced here—I mean the progress schedule introduced—does it show that in many operations you did, in fact, start the work several weeks, or several days, before the work would normally be started?

A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. Just give the Court one example of that, Mr. Borst, and take Exhibit No. 57.

Mr. Watts: Before I ask Mr. Borst to complete his answer in respect to Exhibit No. 57, let me say that Mr. Gibson has asked me a question about this during the recess that indicates that we perhaps have not drawn it as clearly as we could, and I want Mr. Borst to explain the difference between the first and second operations, if I may?

The Court: Yes, go ahead.

Q. (Mr. Watts, continuing:) Mr. Borst, what part of this diagram which appears on page seven of exhibit No. 75, and is reflected in this large scale, are you concerned with in describing the second operation? [347]

A. The second operation is here (indicating), and we are concerned with the second, or the lower, bar. This first had been for comparison only, but it is the lower portion that we are concerned with now.

Q. And how about the third operation?

A. The bottom bar is the only bar that operates as to the third operation.

Q. And the other two, as you said of the second operation in connection with this, is for comparison only?

A. Yes, sir: these two are for comparison (indicating).

Q. Now, will you point out to the Court one, or a number of, instances in which you started opera-

(Testimony of W. Lyle Borst.)

tions ahead of the normal schedule on erection of the three boilers? Show how it is indicated on Exhibit No. 57.

A. This deals with boiler number one. Directing your attention down to this item here, the pulverizer, exhaust, burners and soot blowers, that normally would have commenced on the first of August, but we commenced it back here on the 27th of July. This item, boiler exterior casing, we would have started that on the 18th of September, according to schedule, but we put it in operation on the fifth of September.

Q. How many days ahead of schedule was that?

A. Thirteen days, and this situation on the forced draft fans and drives, that we would have started on the first of [348] September, but the schedule shows we started that on the 7th of August, and, as I say, it would have normally started on the first of September.

Q. You started this work earlier, ahead of schedule, because you didn't have any tubes?

A. That is right.

The Court: I think I understand it thoroughly now. Now then, you may proceed with your explanation as to what the extra cost in percentage on the three operations was.

A. I don't think I gave the operational result on the third operation, and that resulted in a seventeen and one-half per cent excess cost over the normal cost.

Q. (Mr. Watts, continuing:) Over the normal

(Testimony of W. Lyle Borst.)

cost?

A. Yes, sir; on that particular job.

Q. In arriving at the estimate of the loss for the excess cost of the labor, how do you arrive at the figure that you have there? What do you do to arrive at that?

A. We average these three (indicating).

Q. That is the five per cent, the fifteen per cent and the seventeen and a half per cent, by adding and dividing, is that the way you arrive at it?

A. Yes, sir; we add the five, the fifteen and the seventeen and a half, and then we divide by three, and get [349] the twelve and a half per cent over-all loss, or excess cost.

Q. What does that mean in terms of dollars to the plaintiff?

A. That represents \$14,611.72, this figure here (indicating).

Q. Then if the loss was twelve and one-half per cent, that is, over the normal cost of the job, what percentage, strike that, please. If the average loss in efficiency was twelve and a half percent, what, in percentage, was the actual cost of the entire operation?

A. One hundred twelve and one-half per cent.

Mr. Gibson: He is now reading from that map, or chart?

Mr. Watts: Yes; he is.

Q. And, Mr. Borst, is that your best judgment of the percentage cost of this operation?

(Testimony of W. Lyle Borst.)

A. Yes, sir.

Q. What was the cost in dollars and cents to the Power Service Corporation?

A. \$131,505.47.

Q. And that is shown on Exhibit No. 66?

A. Yes, sir; that is right.

Q. How did you arrive at the normal labor costs of the [350] operation?

A. I used one hundred per cent instead of the one hundred twelve and one-half per cent, and that put us back to \$116,893.75.

Q. And what, in your opinion, would have been the normal cost of operation had you not been delayed because of non-delivery or late delivery of these water tubes and headers?

A. \$116,893.75.

Q. The difference between those two figures represents what?

A. \$14,611.72.

Q. And what is the item of \$14,611.72?

A. That is item No. 5 in the claim for damages.

Q. And what is your opinion as to whether or not that is a reasonable estimate of the difference between the actual cost of this job and what would have been the cost if you had not had any of these delays?

Mr. Gibson: We object to that as calling for a conclusion, and being purely an arbitrary estimate. It is a figure based on a consideration that is variable under any number of circumstances. I object to the testimony as to the reasonableness of it. He is not qualified to give such testimony. [351]

(Testimony of W. Lyle Borst.)

The Court: He may answer, subject to your objection, and it may be stricken if the Court determines that it should be.

A. I feel that it is an equitable figure.

Q. In making this computation for the operation, are there certain other elements of damages which are not now being offered in support of this total claim where your company suffered certain losses in the performance of the contract?

Mr. Scholz: You have other testimony that you are not offering, and other damages that you are not asking for?

Mr. Watts: Yes.

Mr. Scholz: Then this is immaterial, entirely immaterial.

The Court: Yes; it is immaterial.

Q. What is the total amount of your claim according to exhibit No. 65?

A. Will you please repeat that question?

Q. What is the total amount of your claim according to exhibit No. 65?

A. \$34,326.88.

Q. Now, as a resume of this, will you give the amount opposite each item as shown in this exhibit?

A. The first is the extra cost of equipment rental, \$2,255.50—

Mr. Scholz (Interposing:) That is just repeating what he has said before. It is objected to as repetition, if the Court please.

The Court: Yes, I think it is all in evidence here.

(Testimony of W. Lyle Borst.)

Mr. Watts: I think it is, too. Very well. And you may take the witness—but first, I offer in evidence Exhibit No. 65.

Mr. Scholz: I think our objection is in the record.

The Court: Yes, I believe it is. The exhibit will be admitted, however.

Mr. Gibson: I doubt very much that we do have an objection in the record as to this exhibit, and I want to object to the part of the subject matter that has been explained, and coming back to the percentages of the overhead, with no supporting data in the testimony offered by the witness, Mr. Borst, who is not qualified, and whose testimony was rejected on the question of overhead at the home office. I object to that as incompetent, irrelevant and immaterial, and it is based on hearsay without the proper foundation. This is in addition to the present objection which is, [353] perhaps, in the record, as to Count one, and as to any testimony going to show that it is in excess of the ten thousand dollar claim.

Mr. Watts: I promised to produce the testimony of the treasurer of the company as to the overhead, and I shall do that.

The Court: It is admitted with that understanding.

(Whereupon Plaintiff's Exhibit 65, for identification, was admitted in evidence.)

EXCERPTS FROM DEPOSITION OF
DELBERT C. SMITH

Question No. 7: Describe in some detail what you did to put that part of the equipment which had not been installed in Power House No. 1 "in stand-by" condition, first, with respect to the treatment or conditioning of the equipment, and, second, with respect to inventorying the same.

Mr. Scholz: We object to that on the ground that it is incompetent, irrelevant and immaterial, and also not binding upon this defendant. It states in part, "What did you do to put that part of the equipment which had not been installed in Power House No. 1 in stand-by condition, with respect to treatment and the inventorying of the same." Now, that was on or about June 29, 1943, which was over a year before this contract, and we have the further objection that the contract states that the equipment was in stand-by condition and provided for the [356] inventorying of the same, and put the plaintiff on notice that he is to check the same before submitting a bid.

The Court: I don't see how it could be competent here. It certainly could not be binding on the defendant, and as counsel said, it is a year ahead of the contract. I think it is immaterial.

Question No. 8: When was this inventory taken?

Mr. Gibson: Now, I want to make the same objection because the inventory was taken preceeding this contract. It was considerably preceding the time of the contract, and has no bearing on this,

(Deposition of Delbert C. Smith.)

and it is incompetent, irrelevant and immaterial.

The Court: I cannot see how it is material.

Mr. Watts: I want to show, if your Honor please, that this man Smith had knowledge of the fact that certain boiler tubes and water-wall headers were missing when the specifications were written, and that he prepared the specifications.

The Court: But your action here is against this defendant.

Mr. Watts: But the specifications which were offered to us by the defendant were prepared by this man, and we will prove it.

Mr. Gibson: I want to object to that statement.

The Court: I cannot see how this is material, but possibly we are encumbering our record more than we would by letting it in. However, I will sustain the objection to this.

Question No. 9: Did you determine at that time whether or not there were any shortages of materials required to complete the installation of the boilers in Power House No. 1?

Mr. Gibson: We object to that as being incompetent, irrelevant and immaterial, and it is entirely too remote from the formation of this contract.

The Court: Do you have testimony to connect it up with this defendant?

Mr. Watts: Yes, I have the specifications which this man wrote, and which were subsequently modified by the A-E-M and submitted to my client to bid upon, so that, in effect, the defendant Mr. Joslin has adopted those specifications.

(Deposition of Delbert C. Smith.)

The Court: But these were prior to the contract.

Mr. Watts: But that has a bearing on this question.

The Court: I will permit him to answer, subject to the objection. [358]

Question No. 14: State briefly what you did, and what, within your personal knowledge, was done with reference to preparing these specifications to be used by prospective bidders?

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial. The specifications speak for themselves. This was before the plaintiff came into the picture at all.

The Court: He may answer this. It is more or less descriptive of what was done.

Mr. Gibson: And I want to add to the objection that it calls for a conclusion. [360]

Mr. Murphy re-wrote and revised the specifications I had written leaving out the clause covering the missing water-Wall tubes—

Mr. Gibson: (Interposing) I object to all this again, your Honor, and I ask that it be stricken from the record as a conclusion.

The Court: Yes; I think it may be stricken.

Question No. 18: Plaintiff now requests the Reporter [363] to identify the exhibit described by the witness in answer to Interrogatory No. 17, and offers this exhibit in evidence as Exhibit "A" of these interrogatories.

Mr. Gibson: To which we make objection, and

(Deposition of Delbert C. Smith.)

ask that it be stricken on the ground that this person testifying was not an agent or an employee of the defendant. It was an appraisal made before the final specifications and plans were submitted to the plaintiff for bidding. There was no privity of contract. It is just a rough draft prepared by the engineer and his superior, Mr. Hagan, apparently didn't like it.

The Court: I will take your motion to strike under advisement. [364]

EXCERPTS FROM DEPOSITION OF
EUSTICE C. CLAY

Q. Were you employed by the Hercules Company when what is known as a "stand-by" order was received in September of 1943, or about that time, with respect to the erection of certain boilers in power house No. 1 at Sunflower?

Mr. Gibson: I ask that the answer be stricken. It antedates the contract under discussion by practically a year.

The Court: I will permit him to answer. I don't know what the answer is.

A. I was.

The Court: I think it is well taken, but I will let it stand for the present, under the ruling I have heretofore made.

Q. Relate, briefly, what has been done with respect to the erection of these boilers in power house No. 1 before the stop order was received, and by whom it was done, if you know.

(Deposition of Eustice C. Clay.)

Mr. Gibson: We object to the witness testifying. He is not qualified as an expert, and no foundation to show that he was so qualified. [377]

The Court: I believe I sustained this same objection last Friday to the same line of testimony. However, under the present ruling it may go into the record, and I will determine later whether I shall strike it or not.

A. The material was presumed to have been all received and erection was proceeding at the time of the stop order.

Mr. Gibson: I move to strike the answer now as it is obviously a conclusion of the witness. He has said "the material was presumed to have been received."

The Court: I will sustain the objection to that.

Q. Do you know by whom the erection was being made at the time the stop order was received?

A. The erection was being conducted under the supervision of the Combustion Engineering Company who were furnishing the materials.

Q. Now, were you still employed by this company when the order which is known as the "resume work" order was received on or about May 3rd, 1944?

A. I was.

Q. When the "stop" order was received state what was done with respect to the taking of an inventory?

Mr. Gibson: We object to that. It is without the knowledge of this witness, and it is remote, incompetent, and immaterial, and also irrelevant.

(Deposition of Eustice C. Clay.)

The Court: He may answer, but it will have to be connected up.

A. That was out of my jurisdiction and I do not know exactly how that was conducted, or by whom.

Q. Do you know what division was in control of making inventories so far as the Hercules Company is concerned?

Mr. Gibson: May we have the same objection as we had to the preceding question?

The Court: Yes, you may, and the same ruling.

A. Such work usually was inaugurated by the chief engineer to the division engineer, which in this case was Mr. Smith. The inventory would have been under — the physical inventory would have been under the direction of Mr. Fuhn, the property control engineer.

Mr. Gibson: Now we move the answer be stricken as hearsay, and not based upon any direct information of this witness.

The Court: Your motion will be taken under advisement, and the Court will reserve ruling.

Q. In what division of the Hercules Company?

A. The property control division.

Q. Now, who was this fellow Delbert C. Smith?

A. Mr. Smith was employed by the Hercules as division power engineer. [379]

Mr. Gibson: We object to that as not being responsive; that is asking for a description and not for the qualifications, or the employment of the man.

(Deposition of Eustice C. Clay.)

The Court: The answer may stand, subject to your motion to strike.

Mr. Gibson: Then I make a motion to strike at this time.

The Court: And your motion will be taken under advisement. The Court will reserve its ruling.

Q. Was he later employed by the A-E-M in the engineering department?

A. He was employed either by the A-E-M, or one of the subcontractors. I do not know on whose payroll he was.

Q. Now, relate briefly what you know about the preparation of specifications in June of 1944 after the "resume work" order was received.

A. The first word that I had that the "resume work" order was in, was when Mr. Smith called at my office and informed me of the fact.

Mr. Gibson: I ask that the answer be stricken as not responsive, the question being, "to relate briefly what you know about the preparations of the specifications after the resume order was received," and this is an interjection. [380]

The Court: It seems to me it is more or less immaterial, however it may stand. You may proceed.

Q. This was prior, was it, to the time when the bids were called for? A. Yes; it was.

Mr. Gibson: I object to this and ask that it be stricken as hearsay.

The Court: Your motion will be considered the same as the others.

(Deposition of Eustice C. Clay.)

Q. Now, what did you then learn about the presence, or absence?

A. May I correct that last?

Q. Surely.

A. Yes, it was, as I was informed by Mr. Smith.

Q. Now, what did you learn at that time about the presence or absence of certain water-wall tubes for this particular job?

A. Mr. Smith said that there were missing materials, that an inventory had been conducted, and as soon as it was definitely learned what was missing, I would be advised, in order to expedite that required material into the plant.

Mr. Gibson: I move that the answer be stricken. It is obviously hearsay, and without the knowledge of this man. We have the deposition of Mr. Smith before the Court. [381]

The Court: It would have to be connected up with the defendant in this case.

Mr. Watts: Yes; that is my understanding.

Q. You stated now that you were then the chief expediter for the Hercules Company?

A. Right.

Q. What, briefly, were your duties as such expediter? In other words, show please where you fit into this scheme of operation out there.

A. What one might call the chain of command originated the proceed order in Washington, which, in turn, was relayed by Ordnance, Washington, to the Corps of Engineers, Washington. Ordnance,

(Deposition of Eustice C. Clay.)

Washington, then advised the home office of Hercules Powder Company at Wilmington, who in turn advised the manager for Hercules at Sunflower. It went then to the chief engineer who directed the division engineer to proceed. A bill of materials would be drawn by the division engineer of missing or required parts and supplies, who would have it authorized or O.K.'d by the chief engineer, and would be brought to the purchasing department.

Mr. Gibson: To which I object, and ask that it be stricken as not being responsive, and also that it is hearsay. It may, or may not be, within the knowledge of this witness. The question was to state briefly his duties as such expeditor, [382] to show where he fit into the scheme of things, and he goes off on a long paragraph that is not responsive.

The Court: The same ruling as to previous questions and answers. You may have your motion to strike and it will be considered later by the Court.

Mr. Gibson: We make a special objection, and move to strike that, as not being responsive. Obviously there is a misunderstanding of the question by the witness. The witness was obviously thinking of the bidder specifying the material itself.

The Court: I will admit it under the same ruling.

Q. You know, of course, don't you, that there was subsequently a call for new bids by outside contractors for the erection of Power House No. 1?

A. Yes; Because the original contract had been completed and Combustion Engineering Company had so much other work at that time that they declined to re-bid to complete this power house physically.

Mr. Gibson: Now I ask that the answer be stricken as a conclusion of the witness. He admits that he is employed by Hercules and not by the Combustion.

The Court: The objection is clearly well taken, but you may proceed with the deposition, and I will consider this together with all the other matters.

Q. Before this new bid was offered, did you have this conversation with Mr. Delbert Smith?

A. I did.

Q. Now, did you have any more conversations with him [385] between that time and the time that the bid, or the award, was made to the Power Service Corporation? A. Several.

Mr. Gibson: To which I object and I want to say again that Mr. Smith was never employed by the defendant in this action. There is no connection of him as agent or employee, or anything, in any capacity, in any way, that he would be able to act for us. This was before the bids were offered, and was a preliminary step, and this testimony is obviously hearsay.

The Court: Of course, if counsel does not connect this up, it will all be stricken.

Mr. Watts: I think I have before the Court evidence of these conversations and conferences.

(Deposition of Eustice C. Clay.)

Q. Relate what was said and what was done between the time of your first discussion with Mr. Smith, and the time when the award was made to the Power Service Corporation?

Mr. Gibson: I tried to find something in this that would cast even a shadow as to Counts one, two or three, and I am not trying to pick a fuss with the Court or with counsel in this matter, but here are questions that they obviously cannot be binding on us, and here is a question, particularly, that calls for hearsay testimony. [386]

A. I called my liaison officer in Washington in the office of the Chief of Ordnance Ammunition Division, Major James Baldwin, and explained the situation, the urgency connected with it, because the urgency had been stressed to me by the commanding officer for the corps of engineers.

Mr. Gibson: I have made repeated objections, but I want to be sure that the Court is taking all of this testimony subject to my motion to strike, except, of course, where I will withdraw my objection.

The Court: Yes. That is fully understood, and I will say now without hesitation, counsel has said that he will connect it up with the defendant in this case. In addition to this testimony, other testimony is received subject to a motion to strike, and I will say that there is a great deal of this testimony that I am positive is nothing but a conclusion of the particular witness testifying, and would not be admissible if the witness were here himself.

(Deposition of Eustice C. Clay.)

However, I am going to proceed with this deposition, and you may have your motion to strike.

Mr. Sholz: Counsel has said that he can connect this up. Now, I would request counsel to make an offer of proof as to how he intends to connect this up, so that the Court may be advised now whether he can connect it up or not. [389]

The Court: I realize that counsel for plaintiff says he will connect this up, and I will let him proceed with the understanding that your objection is in to this entire deposition, and the matter is taken under advisement by the Court.

Q. Meaning whom?

A. I disremember his name, but he was a tall, thin individual that originally came from Kansas City.

Mr. Watts: It is indicated here that I asked Mr. Joslin a question, "Do you remember his name?" Mr. Joslin answered, "Major Matthews." And then the answer was continued as follows:

A. —where in a telephone conversation he stated to me that there was a possibility that a suit for damages might occur at a later date, should the materials, etc., not be available when required, and he felt I would be protecting my employers' interests if I used all possible dispatch in procuring this missing material.

Mr. Gibson: This man is an employee of Hercules testifying here, and it seems to me that this is the rankest kind of hearsay testimony.

(Deposition of Eustice C. Clay.)

The Court: Yes, this is. I agree. But he may proceed with the deposition, and the matter will be handled in the same way that I have indicated heretofore. [390]

DEPOSITION OF C. HOWARD MURPHY

Mr. Watts: This was taken on interrogatories on the 10th of January, 1947. "The said C. Howard Murphy appeared before me, and being personally sworn before me to tell the truth, made answers to the questions as follows:

Q. State your name.

A. C. Howard Murphy.

Question No. 2: Where do you live? At the present time?

Answer: Greeley, Colorado. [407]

Question No. 3: What is your business address?

Answer: 1023 Ninth Avenue, Greeley.

Question No. 4: In July, 1944, what was your occupation?

Mr. Gibson: I object to this testimony as Mr. Murphy was not employed by the defendant; he was not an employee of the defendant or an agent or employee in any manner, but was an agent or employee of the A-E-F. His testimony is incompetent, irrelevant and immaterial, and would not be binding on the defendant, and it is not within the issues of this case, and this is made as well as the specific objection to the item,—just strike that last portion. I will make the objection that the testi-

(Deposition of C. Howard Murphy.)

mony of Mr. Murphy is incompetent, irrelevant and immaterial, and not binding on the defendant, and it is not within the issues of this case.

The Court: I think, Mr. Gibson, your objection is well taken at this time, but I will admit it subject to a motion that it be stricken later.

Mr. Watts: Our reasons for this testimony is that this is the man who prepared the specifications which the defendant presented to us upon which we bid. They were the specifications of the defendant upon which we made our bid. [408]

The Court: Of course I expect you to sustain this testimony in your brief.

Mr. Watts: Yes, certainly.

Answer: I was manager of the subcontract department for William S. Lozier, Incorporated, Broderick & Gordon, usually referred to as the A.-E.-M., on the construction contract at Sunflower Ordnance Works.

Question No. 5: What, if anything, did you do in connection with the preparation of the specifications for the erection of boilers in Power House No. 1 when a resume word order was received by Col. Taylor in May of 1944?

Answer: I requested of the Engineering Division of the A.-E.-M. that technical specifications be submitted to my department to be incorporated into a contract specification giving the basis upon which to accept bids,—

Mr. Gibson: The rest of this answer, except what has been given now, I object to as incompe-

(Deposition of C. Howard Murphy.)

tent, irrelevant and immaterial, and hearsay, and is the expression of an opinion.

The Court: Mr. Watts may read the entire answer and then the Court will rule.

Mr. Watts: I will begin and read the entire answer:

Answer: I requested of the Engineering Division of the A.-E.-M. that technical specifications be submitted to my department to be incorporated into a contract specification [409] giving the basis upon which to accept bids. After a considerable delay I discovered that the specifications were not available and suggested to J. S. Hagan Engineering Division that since little progress was being made and that there was great urgency and necessity in getting the specifications prepared at the earliest possible date that he and I jointly assemble the information prepared to date in such a manner as to permit the taking of bids. This was done within the next two or three days. This was done by using principally the technical data which had previously been prepared by Mr. Delbert C. Smith.

Question No. 6: What knowledge did you have at that time of the presence or absence of materials on the site ready for erection?

Answer: I had no special knowledge of actual materials available,——

Mr. Gibson: ——I object to the rest of this answer as being hearsay and as being incompetent, irrelevant and immaterial.

(Deposition of C. Howard Murphy.)

The Court: I think it is hearsay, but he may continue with the answer.

Mr. Watts: May I read the question and answer again?

The Court: Just read the entire answer. The question is in the record, Mr. Watts.

Answer: I had no special knowledge of actual materials [410] available. However, I had knowledge that the materials intended for Power House No. 1 had been in storage for a considerable length of time, and I believed from the information obtained from Mr. Smith, both verbally and in the form of partially written specifications, that all of the essential materials were available and ready for erection. At the same time I knew from experience that some materials including flanges, couplings, hangers, bolts and miscellaneous items would be missing, and it was for that reason that I used the term "nearly all" at the commencement of clause 5-04 (c) of the specifications.

Mr. Gibson: Now, I make a motion to strike the answer as not responsive to the question asked, and as being voluntary and based upon a conclusion of the witness. The vice of this is that we were given the proposed interrogatories by mail. We had no way of knowing what kind of counter interrogatories we could prepare. However, we did prepare them on the main question of the contract. Now Question No. 6 of these interrogatories is: "What knowledge did you have at that time of the presence or absence of materials on the site ready

(Deposition of C. Howard Murphy.)

for erection?" And he gives an answer to that,—a complete answer to the question and then goes on with a conclusion as to why he answered the question. It gives his judgment and his reasons, and those are of no concern to us. He was given a job to do, and as far as we were concerned plaintiff accepted the contract. Of course we have our interpretation of the matter. We certainly object to this being in the record. It is unfair, and counsel knows that it is.

Mr. Watts: I think, if the Court please, this is an entirely proper answer. The Court is interested in getting the facts of this matter.

Mr. Gibson: We want the facts, and we also want the truth.

Mr. Scholz: He states in the previous answer that technical specifications would be submitted to his department. He is a draftsman. He gives this information or opinion. He says, "I knew that certain materials were missing." Now, furthermore, if the Court please, the question is specifically, "What knowledge did you have at that time of the presence or absence of materials on the site ready for erection?" We had no way of knowing what Mr. Murphy's answer would be.

The Court: The answer to the question is followed by a lot of hearsay. I don't see how it has any bearing on Count No. 2 or No. 3; his reasons for writing the specifications is all included in there, and I think that portion will be stricken.

(Deposition of C. Howard Murphy.)

The rest of the answer will be left in the record, and of course that will be subject to your motion to strike, and the motion will be considered to have been made at this [412] time.

Mr. Gibson: Now, I understand the portion the Court has ruled on is that portion starting with the word "however." Where it does not directly answer the question.

The Court: That is correct. At this time we will take a fifteen minute recess.

March 24th, 1947, 3:15 p.m.

The Court: You may continue with your deposition, Mr. Watts.

Question No. 7: Specifically, when you prepared these specifications did you know that any tubes or headers were missing?

Answer: No.

Question No. 8: Specifically, when the award was made to Power Service Corporation on July 13, 1944, did you know that any of the tubes or headers were missing?

Answer: No.

Question No. 9: Did you know that any of the tubes or headers were missing when you mailed the contract to Power Service Corporation on July 14th for their signature?

Answer: No.

Question No. 10: Are you familiar with the history of special clause relating to damages which appears on the signature page of the contract be-

(Deposition of C. Howard Murphy.)

tween Cory, Joslin & Macnsons [413] and the Power Service Corporation?

Answer: I am somewhat familiar with the clause. However, upon receipt of a request from Power Service Corporation that a clause be incorporated into the contract with respect to damages for delay, I turned the request, together with available information, over to the Legal Department of the A.-E.-M., meaning to Phillip A. Der-gance, attorney for the A.-E.-M., for his recommendation and action.

Question No. 11: Now, Mr. Murphy, how long have you been an architect?

Answer: Ten years.

Question No. 12: Are you familiar with the normal sequence of erection of work of a type similar to the boiler erection at Sunflower Ordnance Works?

Answer: Yes, sir.

Question No. 13: Where there are three or more similar operations to be performed by the foreman and mechanics, tell the Court whether or not efficiency normally increases with the second and third operations.

Answer: Yes, normally.

Question No. 14: Now, what happens when the sequence of operations is broken, for example, by delay in obtaining materials during construction?

Answer: It would very logically decrease efficiency, and therefore increase costs. Here is what happens: When a stoppage [414] occurs because of

(Deposition of C. Howard Murphy.)

the lack of materials it is necessary to terminate mechanics or find other work for them. If the stoppage occurs for any length of time frequently a new crew must be assembled and trained to perform a given operation at the same cost as the first operation, and the contractor loses the benefit of any increased efficiency on the subsequent operations. I believe this was particularly true during the war period when there was a large labor turnover. The percentage in loss of efficiency would, of course, vary with different operations and different workmen, but there is definitely a real loss of efficiency when anticipated construction schedules are interrupted by lack of materials.

Mr. Watts: At this time the plaintiff offers in evidence the deposition of E. E. Taylor, a witness called by the plaintiff, and after being first duly sworn, testified as follows: [415]

DEPOSITION OF E. E. TAYLOR

having been first duly sworn, testified and deposed as follows:

Direct Examination

Question: State your name, please.

Answer: E. E. Taylor.

Question: Where do you live, Mr. Taylor?

Answer: 1641 Dayton Avenue, St. Paul.

Question: And what is your present business address?

(Deposition of E. E. Taylor.)

Answer: 614 Builders Exchange, Minneapolis.

Question: What is your present occupation, Mr. Taylor?

Answer: I am treasurer of the Mid-west Engineering, Incorporated.

Question: What is your profession or business, generally? Answer: Engineer.

Question: How long have you been an engineer?

Answer: Since about 1922.

Question: Twenty-five years then, is that right?

Answer: That is right.

Question: Generally, what has been the nature of your experience as an engineer? Relate it briefly, please.

Answer: All kinds of construction work, preparation of plans, the specifications, supervision of it, and contracting.

Question: During the years 1943 and up until July 12th [416] 1944, where were you employed, or occupied? And in what capacity?

Answer: I was an officer in the Corps of Engineers, United States Army.

Question: Where were you stationed?

Answer: From September, 1943, until,—wait a minute,—September, 1942, until July, 1943, I was Area Engineer and later Resident Engineer at the Sunflower Ordnance Works, DeSoto, Kansas.

Question: And in that capacity you carried the title in the Government of what?

Answer: I had several titles, one of them when

(Deposition of E. E. Taylor.)

I went there, I was listed as a Major in the Corps of Engineers, and later a Lieutenant Colonel, and I was contracting officer for the Sunflower Ordnance Plant.

Question: What was your rank then at the time that you left there on July 12th, 1944?

Answer: Lieutenant Colonel.

Question: And you occupied the office, or you were serving in the capacity of what, at that time?

Answer: Resident Engineer and Contracting Officer.

Question: On behalf of the United States Government? Answer: That is right. [417]

Mr. Watts: On page forty-four, near the top of the page: "Question: What happens to the efficiency of a construction crew because a contractor runs into a delay because of lack of materials?"

Mr. Scholz: Now, we want to object to this, if the Court please, as being incompetent, irrelevant and immaterial and calling for a conclusion of the witness, and it is without foundation. Colonel Taylor was not on this job after the twelfth of July. He is testifying now as an expert, and this does not include all of the factors, or all of the facts which would enable the witness to testify to a hypothetical question.

The Court: It would not apply particularly to this job, but to ordinary jobs. I think that anyone could testify that there would be delays if there was no material with which to go ahead. I believe I will permit him to answer.

(Deposition of E. E. Taylor.)

Answer: Oh, the efficiency is materially reduced. Men have a tendency to slow down if they become aware that the material is running out, and if the time of the contract is extended, why, the overhead naturally goes up.

Mr. Gibson: Now, I move that the answer be stricken on the grounds states in the motion in the deposition, that it is a conclusion; that it is incompetent, irrelevant and immaterial, and not a statement of fact, and without foundation.

The Court: That is probably true, but the answer may stand. [429]

Mr. Gibson: And there were some facts that were not included in the question presented to the witness.

The Court: That is probably also true, but the answer may stand for the present, at least.

Mr. Gibson: We make the objection also that it does not say that there may be other work on the job so that these men could keep on going.

The Court: I am wondering now which question the objection is made to?

Mr. Gibson: There were two questions there that are practically the same, and if agreeable, my objection may go to both of those questions.

Mr. Watts: The question at the bottom of page forty-four: "State whether or not when delays are encountered in furnishing materials it normally takes the labor a longer period in which to complete a contract."

(Deposition of E. E. Taylor.)

Mr. Gibson: Now then, my objection may also go to that question?

The Court: Yes; it may. And I think I will permit him to answer, subject to your objection. It seems to me rather immaterial.

Answer: Well, it would naturally follow that if they had to wait for materials that it would take them longer to complete it. [430]

The Court: That seems a very logical answer.

Question: Is there any resulting loss in efficiency during the time that the men are working?

Mr. Gibson: We make the same objection.

The Court: He may answer.

Answer: There usually is, especially if they are aware of the fact that you are running out of materials.

Question: I hand you what has been marked here for introduction in the trial as Exhibit No. 66. Tell me what that exhibit is, first, please.

Answer: That is a construction schedule for subcontract for No. 5-5 for the completion of Power House No. 1.

Question: Tell me how these charts are originally prepared for use in this project.

Mr. Scholz: Mr. Anderson made the objection that it is incompetent, irrelevant and immaterial, and we renew it at this time. This officer was not present on the job. If he is testifying as to the usual procedure, I will withdraw the objection.

The Court: He may answer.

(Deposition of E. E. Taylor.)

Answer: Well, these charts are arrived at by working backwards. You have a required completion date that you must meet, which gives you your over-all curve. Then you break down the various items of work and schedule them so that you will meet the completion date. The main bar at the top of this chart covers the over-all job. On this chart there are six major divisions of work. When these charts are originally prepared you start out with a white bar. The divisions show the percentages which are to be completed at certain dates. For each period the bars are cross-hatched to show what the scheduled completion is and filled in with black to show the [432] actual completion. In this instance here, on this chart which is dated 10-27-44, the main bar showed a scheduled completion of about ninety-five percent, and an actual completion of about seventy-nine per cent.

Question: And the actual completion then is represented by what lines?

Answer: By the solid bar.

Question: Who prepared these construction schedules, and what was done with them?

Answer: They were prepared by the contractor, or rather the subcontractor, in consultation with the A.-E.-M., Architect-Engineers-Managers.

Question: Were they given to, or used by, the contractor in this case, Cory, Joslin & Macnsons?

Answer: They had a wide distribution. They were distributed to everyone on the job, including

(Deposition of E. E. Taylor.)

Cory, Joslin, who was interested in it, and they were distributed to my office, and in turn were used as a basis for the preparation of over-all charts which eventually landed in the Chief of Engineers.

DEPOSITION OF FRANK V. WEDLICK

a witness on behalf of the plaintiff, having been duly sworn, testified and deposed as follows: [434]

Direct Examination

Question No. 1: State your name, address, and business.

Answer: Frank V. Wedlick, 2230 Harlan Boulevard. I am educated as an engineer, and at present am engaged in the manufacture of gas furnaces.

Question No. 2: What date did you commence work for the firm of Cory, Joslin & Macnsons?

Answer: I started in November, 1942.

Question No. 3: What date did you quit work for that company?

Answer: I quit in December of 1944. [435]

Question No. 15: Mr. Wedlick, how many years have you been in the contracting business?

Answer: I am not in the contracting business, but as an engineer I have handled contracting jobs for over twenty [437] years.

Question No. 16: In your experience as an engineer, what are some of the damages that are suffered when a contractor is delayed on a job like the one Power Service Corporation had at Sunflower?

(Deposition of Frank V. Wedlick.)

Answer: The first is shortage of materials. You have to stop and re-plan, and re-schedule the work progress, and adverse weather elements, labor troubles, break-downs in equipment, and holding together your personnel when there are work stoppages due to shortages of materials. [438]

DEPOSITION OF LAWRENCE J. NEUBAUER

a witness for the plaintiff, having been first duly sworn, testified and deposed as follows:

Direct Examination

Question: State your name, please.

Answer: Lawrence J. Neubauer.

Question: Your residence address?

Answer: 4321 West Forty-second Street, Minneapolis.

Question: How long have you lived in this city?

Answer: I have lived in this city two years this month.

Question: What is your occupation?

Answer: Mechanical engineer.

Question: How long have you been in the profession?

Answer: Since graduation from the University in 1921.

Question: Approximately twenty-six years. In 1944, in the month of July, by whom were you employed?

Answer: Employed by Hercules Powder Company.

(Deposition of Lawrence J. Neubauer.)

Question: In what capacity?

Answer: As construction mechanical engineer.

Question: And how long did that employment continue? Until about what date?

Answer: I think I was there a little over a month, probably a month and a half.

Question: And then with whom did you go?

Answer: Lozier, Broderick & Gordon.

Question: And as a mechanical engineer with Lozier, Broderick & Gordon, did you have an office next door to the Power Service Corporation kept by Mr. Borst? Answer: Yes, sir. [440]

DEPOSITION OF MR. P. C. GAFNEY

a witness on behalf of plaintiff, having been first duly sworn, testified and deposed as follows:

Direct Examination

Interrogatory No. 1: State your name and address. [459]

Answer: P. C. Gafney, 5624 Grand Avenue, Minneapolis, Minnesota.

Interrogatory No. 2: What is your occupation?

Answer: Treasurer of Power Service Corporation.

Interrogatory No. 3: How long have you been the treasurer of the Power Service Corporation?

Answer: Ten years.

Interrogatory No. 4: Did you occupy this position during the entire year of 1944?

(Deposition of P. C. Gafney.)

Answer: Yes.

Interrogatory No. 5: State whether or not the books of the Power Service Corporation for 1944 were kept under your supervision and direction?

Answer: Yes.

Interrogatory No. 6: From those books please state the total amount of the overhead expenses of the Power Service Corporation for the year 1944.

Mr. Sholz: We object to that as incompetent, irrelevant and immaterial. The best evidence are the books themselves, or certified copies.

Mr. Watts: We have it here.

The Court: The objection will be sustained.

Mr. Watts: I offer to show that the witness would, if permitted to answer, testify that the amount of overhead [460] expenses for the year 1944 was \$75,316.58.

The Court: You may proceed, Mr. Watts.

Interrogatory No. 7: Do you know, independent of those books of your own knowledge, the amount of overhead expenses for the Power Service Corporation for the year 1944?

Answer: Yes.

Interrogatory No. 8: How much were such expenses? Answer: \$75,316.58.

Interrogatory No. 9: Give the specific items and amounts thereof which go to make up this total overhead expense of \$75,316.58.

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and also on the same

(Deposition of P. C. Gafney.)

ground as stated in an objection heretofore made. Here is a man who is treasurer of the company, and not an accountant.

The Court: I will permit him to answer this question, in view of the statement that was made in one of the previous answers, that he was able to tell the expenses, or knew the expenses of this company, aside from what was shown in the books, that he had independent knowledge. I will permit him to answer in view of that statement, but I will say that I hardly believe that statement.

Mr. Gibson: We also object to that as not being the best evidence.

The Court: He may answer. [461]

Answer: Advertising, \$186.00; drafting-room expense, \$6.80; legal expense, \$1,075.00; office and general expense, \$2,257.02; insurance, \$681.61; pension retirement fund, \$7,556.89; postage, \$230.00; prospective business, \$3,014.80; rent of office, \$1,903.36; repairs to equipment, \$147.09; telephone and telegraph, \$192.81; taxes, capital stock, \$875.00; unemployment compensation and excise, \$631.16; social security, \$162.66; sundry, \$71.68; depreciation, equipment, \$540.90; yard expense, \$14.29, making a total of \$75,316.58.

The Court: That is quite a remarkable bit of evidence. As the saying is, he certainly was some man to testify all that independent of any records.

Interrogatory No. 10: Do the books kept by you and under your supervision reflect the same

(Deposition of P. C. Gafney.)

amounts as those to which you have above described? Answer: Yes.

Interrogatory No. 11: Do you know, independent of the books and records of the Power Service Corporation, that the amounts set forth in your answer to interrogatory No. 9 were actually expended by the corporation during the calendar year 1944? Answer: Yes, sir.

Interrogatory No. 12: Have you an independent audit made [462] by outside auditors of the books of the Power Service Corporation for the year 1944? Answer: Yes.

Interrogatory No. 13: By whom?

Answer: By the firm of Black, Hanson & Company, Chartered Accountants. Their office is at Port Arthur, Ontario, Canada.

Mr. Watts: At which point there is a notation in the deposition which says, "Which said document was marked Plaintiff's Exhibit "A" by the Reporter, and is returned herewith."

Interrogatory No. 14: I hand you what has been marked by the Reporter as Plaintiff's Exhibit "A" in these interrogatories. Please identify this document for the record.

Answer: This is the report on audit with relative financial statements for the year ending 31st of December, 1944, prepared by Black, Hanson & Company.

Interrogatory No. 15: Does Exhibit "A" reflect the over-head expenses of this corporation in

(Deposition of P. C. Gafney.)

the same amounts as those to which you have testified?

Answer: Yes; and it shows our total overhead expense for 1944 to have been \$75,316.58.

Interrogatory No. 16: Plaintiff now offers in evidence Exhibit "A" to be attached and made a part of these interrogatories. [463]

Mr. Scholz: I have had no opportunity to examine this audit.

Mr. Gibson: And I have not seen any report of the audit, and have had no chance to examine it.

Mr. Watts: Here is the audit he was reading from.

Mr. Gibson: I object to it as incompetent, irrelevant and immaterial.

The Court: In order to save time I will admit it subject to a motion to strike. You may examine it later, and you may make a motion to strike.

Interrogatory No. 17: By way of comparison, what was the total amount of the deductions taken by your corporation on its Federal income tax return for the year 1944?

Answer: \$75,479.35.

Interrogatory No. 18: Will a signed copy of your 1944 Federal Income Tax return be available for trial of this action? Answer: Yes.

Interrogatory No. 19: Do you know, independent of the audit above referred to, that the total sum of \$75,316.58 was actually expended by the Power Service Corporation for overhead expenses during the calendar year 1944?

(Deposition of P. C. Gafney.)

Answer: Yes.

Interrogatory No. 20: What contract, other than the Sunflower [464] Ordnance Works contract did your corporation have in progress during the period between November 10th and December 19th, 1944?

A. We had two contracts in progress; one with the Board of Heating Commissioners at Sleepy Eye, Minnesota, and the other with the Union Pacific Railway Company, Salt Lake City, Utah.

Interrogatory No. 21: Please state the contract price for each of these two contracts.

Answer: The contract price at Sleepy Eye was for \$15,956.00 and the one at Salt Lake City was for \$80,740.00.

Interrogatory No. 22: What was the average number of men employed on each of these two contracts during the period between November 10th and December 19th, 1944?

Answer: The average number of employees during that period of time on the Sleepy Eye contract was four; and on the Salt Lake City contract the average was eighteen.

Interrogatory No. 23: What was the average number of employees during the same period on the Sunflower Ordnance Works contract?

Answer: Eighty-nine.

Interrogatory No. 24: What was the total contract price on the Sunflower Ordnance Works contract? Answer: \$466,821.07. [465]

(Deposition of P. C. Gafney.)

Interrogatory No. 25: What was the total field pay roll on the Sunflower Ordnance Works contract at the end of December 19th, 1944?

Answer: \$227,418.27.

Interrogatory No. 26: What was the total field pay roll on the Sunflower Ordnance Works contract as of the close of November 10th, 1944?

Answer: \$181,467.26.

Mr. Watts: That is all of the direct interrogatories.

The Court: Do you care to go on with the cross interrogatories of this witness, Mr. Gibson?

Mr. Gibson: Yes; I will read the cross interrogatories and answers. They start near the bottom of page seven of the deposition:

Cross Interrogatories

Cross-interrogatory No. 1: Referring to Interrogatory No. 7, just what do you include as overhead?

Answer: Home office expenses, payroll taxes, and so forth.

Mr. Scholz: These were all put in writing, and of course we expected the same degree of sincerity in answering the cross interrogatories as he gave to the plaintiff.

The Court: You may proceed with the cross interrogatories, Mr. Gibson.

Cross-interrogatory No. 2: Is not overhead confined [466] to indirect cost, such as home office, administrative forces and non-productive work?

(Deposition of P. C. Gafney.)

Answer: Yes.

Cross-interrogatory No. 3: Are not field foremen and field superintendents only employed during actual construction? Answer: No.

Cross-interrogatory No. 4: Do you include the field foremen and field superintendents in charge of erection and construction as overhead?

Answer: No.

Cross-interrogatory No. 5: Are not field foremen and field superintendents items of labor on every job, and should they not be carried as labor and not carried as overhead? Answer: Yes.

Cross-interrogatory No. 6: What per cent of your home office expense would be charged against the Sunflower Ordnance Works job?

Answer: There is no home office expense assigned to any particular contract.

Cross-interrogatory No. 7: What percentage of the Power Service Corporation's home office forces are the same personnel as employed by the Fegels Construction Company?

Answer: Only the corporate officers.

Cross-interrogatory No. 8: Are not the offices and space [467] occupied by Power Service Corporation the same officers, and the same office space as that of the Fegels Construction Company?

Answer: Yes.

Cross-interrogatory No. 9: Would not the amount, or per cent, of the overhead, including home office, office personnel and officers' salaries

(Deposition of P. C. Gafney.)

be distributed according to volume of work performed by each company?

Answer: No; this is entirely Power Service Corporation overhead.

Cross-interrogatory No. 10: Do your records show the salaries of both the Power Service Corporation's home office employees and employees of the Fegels Construction Company?

Answer: No; Power Service Corporation is a separate corporate entity.

Cross-interrogatory No. 11: What do they show for the year 1944?

Answer: Power Service Corporation's records show \$75,316.58.

Cross-interrogatory No. 12: Do your records show the volume of business done by each, the Power Service Corporation and the Fegels Construction Company for the year 1944?

Answer: No. Power Service Corporation's records do not show anything in connection with Fegels Construction Company. [468]

Cross-interrogatory No. 13: Do your records show a segregation of overhead in accordance with the volume of work done by each, the Power Service Corporation, and the Fegels Construction Company in the year 1944?

Answer: No.

Cross-interrogatory No. 14: What was the amount of overhead charged against the Sunflower Ordnance job?

Answer: None, directly. All the overhead is reflected in the statement on Exhibit "A".

(Deposition of P. C. Gafney.)

Cross-interrogatory No. 15: What per cent of the total volume of work at the Sunflower Ordnance does this amount represent?

Answer: See statement on Exhibit "A".

Cross-interrogatory No. 16: \$75,316.58 represents what per cent of the total volume of work done by Power Service Corporation in the year of 1944?

Answer: One hundred per cent of the overhead.

Mr. Gibson: That is the cross interrogatories of the witness Gafney.

Mr. Watts: We now offer the deposition of Emil Nelson. This was taken at the same time some of the other depositions were taken, on the 20th of January, 1947, and it shows that Mr. Emil Nelson was called as a witness, and upon being duly sworn, testified as follows: [469]

DEPOSITION OF EMIL NELSON

a witness on behalf of plaintiff, having been duly sworn, testified and deposed as follows:

Direct Examination

By Mr. Watts:

Question: What is your name, please?

Answer: Emil Nelson.

Question: Where do you live?

Answer: 5348 Thirty-sixth Avenue South, Minneapolis.

Question: What is your occupation?

Answer: Construction superintendent.

(Deposition of Emil Nelson.)

Question: How long have you been a construction superintendent, or in construction work?

Answer: Oh, I have been working for this company about twenty-eight years.

Question: Working for what company for twenty-eight years? What is the name of the company?

Answer: Power Service Corporation.

Question: Are you presently employed by that company?

Answer: Yes; I am. Can I correct that statement? That means how long I have been working for the company?

Question: Yes.

Answer: In other words, the construction company I worked for is practically the same thing. Power Service Company is a [470] subsidiary of the Hercules Construction Company.

Mr. Watts: The Reporter no doubt meant to say the Fegels Construction Company, and not the Hercules Construction Company. I think that will be agreed.

Question: Were you employed by this company during the period from July 11th, 1944, to December 19th, 1944? Answer: Yes, sir, I was.

Question: Where?

Answer: Sunflower Ordnance Works.

Question: And that is where?

Answer: Kansas.

Question: In what capacity were you employed down there?

(Deposition of Emil Nelson.)

Answer: Construction superintendent. [471]

Question: During the performance of the Power Service Corporation's contract at Sunflower Ordnance Works, state whether or not any shortages occurred?

Answer: Yes, sir; there was.

Question: All right. When, with reference to the commencement of the work, did those shortages become discovered?

“Mr. Anderson: That is objected to as calling for a conclusion, without foundation, and it is irrelevant and immaterial.” [472]

Mr. Gibson: And we adopt that objection.

The Court: He may answer.

Answer: When I first came down there I noticed a shortage of roof tubes. That is the first shortage we noticed.

Question: What else?

Answer: As we went along we were short of water-wall tubes and then water-wall headers. It was not correctly drilled and so we had to send one back and rob one from the other boiler, and then wait until we got another in its place.

“Mr. Anderson: I move that the answer be stricken on the ground of the objection, and on the further ground that it is not responsive, and a mere conclusion.”

Mr. Gibson: We adopt that motion. It seems that certainly he could have fixed the time that he arrived.

(Deposition of Emil Nelson.)

The Court: The answer may stand.

Question: Now, how soon after you commenced work there did you discover that the roof tubes were missing?

Answer: Well, that was when I first came there.

The Court: There is no claim of any delay except on account of delay because of missing water-wall tubes and headers. It seems to me that we are going into everything else, showing everything that was short, and taking a lot of time, but I suppose inasmuch as we have gone this far we might as well go ahead. I might suggest, however, that the defendants have not [473] disputed the fact that the water-wall tubes and headers were short, and as I gather it, there is no claim of any other shortage,—you may go ahead, Mr. Watts.

Question: And how soon did you discover that the water-wall tubes were missing?

Answer: Well, that was during the erection.

Question: Well, within what period of time, approximately, after you commenced?

Answer: Oh, I would say about a week or so.

Question: You spoke something about their being errors in the fabrication of the water-wall headers. Describe that in detail, please.

“Mr. Anderson: That is objected to as incompetent, irrelevant and immaterial, and not within the issues of this case.”

Mr. Gibson: We adopt that.

The Court: He may answer.

(Deposition of Emil Nelson.)

Answer: We erected the water-wall headers and when we came to put the tubes in, the top one had more holes than the bottom one. They didn't match.

Question: What number boiler was that discovered in? Answer: Number two.

Question: What did you do when you discovered that?

Answer: Well, they took the headers down, and we replaced [474] it with one header from No. 3 boiler, and sent the header that was wrong,—sent it back to the factory and it was replaced in number three.

Question: In what way was it wrong, or improperly manufactured?

Answer: Well, the spacing of your holes wasn't laid out right. In other words, it had too many holes in one, or more in one than you had in the other.

Question: And what did you do in the meanwhile for a header for boiler No. 3?

Answer: Well, we had to wait until we received a new header.

Question: Were you delayed any in the performance of the contract while waiting for the new header for boiler No. 3?

“Mr. Anderson: Objected to as calling for a conclusion, without a statement of fact, and without a foundation.”

Mr. Gibson: We object to that as calling for a conclusion of the witness; and as being incompetent, irrelevant and immaterial, and no proper

(Deposition of Emil Nelson.)

foundation having been laid. He does not state in this situation all of the surrounding facts; the delay of any particular header does not mean being delayed on the job as a whole, and we object to this question.

The Court: He may answer.

Answer: Why, certainly we were delayed. [475]

Question: Now, did you come across any other errors in fabrication and in materials that were used in the performance of this contract?

Answer: Well, the boiler tubes in boiler No. 2 on the rear wall header, that was too large holes. I think it was three and one-half inch holes instead of three inch holes.

Question: And as a result of that, what was necessary to be done in order that tubes might fit the header?

Answer: Well, they had to cut the tubes and then weld another nipple, as we call it, to enlarge the tube.

Question: Under your supervision was that done?

Answer: That was by the boiler company.

Question: And the name of that company is what?

Answer: Now, I can't recall it. Faucit-Wheeler, I think.

Question: In any event, did this boiler company send representatives there to help do this work?

(Deposition of Emil Nelson.)

Answer: Yes; it had to be a certified welder do that work.

Question: Was any delay experienced as a result of this enlargement of these tubes?

Answer: Why, certainly.

Question: Now, I want you to state for the benefit of the Court the normal sequence of erecting a boiler unit. What are the natural steps that must be taken in order?

“Mr. Anderson: I object to that as without foundation, and incompetent, irrelevant and immaterial.” [476]

Mr. Gibson: We adopt that objection, that it is incompetent, irrelevant and immaterial. This witness is not qualified as a boiler maker or a boiler man, to know the sequence of the operation. It is simply filling up the record with immaterial testimony.

The Court: We have had a lot of testimony in this case that seems to be doing nothing but encumbering the record, but, as I understand it, counsel does not have a great deal more of this testimony. I believe that he made the statement, possibly not in the record, however, that he only had some thirty minutes more of this. I think he may proceed.

Answer: Well, you erect your drums and line your drums up and then stick your tubes in and then you put in water-wall headers, and all, and your water-wall tubes, and in fact all of it, and then you drop your brick work, and after that you

(Deposition of Emil Nelson.)

put up air ducts and air headers, and the air headers can be installed at any period at any time, because the air header is a separate unit.

Question: And what is the last process that you do?

Answer: You try out the boiler and make out your tests. As soon as you roll your tube before the brick work, you make your hydrostatic tests.

Question: In this normal sequence of construction of a boiler unit, where, with reference to the commencement of the [477] work, does the installation of the water-wall tubes and headers come?

"Mr. Anderson: The same objection."

The Court: He may answer.

Answer: What was that? Oh, well, that is second. The drum, first, and the tubes second.

Question: Well, is it normal for this work to be done after, for example, the building of the ash hopper?

Answer: Well, ash hopper, that is one of your last things. In other words, your drums, your tubes, and then your hydrostatic tests before you do your brick work.

Question: Can you make your hydrostatic tests before you install your tubes for the header?

Answer: No, sir, because the boiler is open, that is all.

Question: Tell the Court whether or not in this instance the normal method of installation was followed in the performance of this contract?

"Mr. Anderson: I make the same objection."

(Deposition of Emil Nelson.)

The Court: He may answer.

Answer: Well, you couldn't go ahead and do it. You would have to lay off work on that particular boiler until you received your material. You couldn't put on your hydrostatic tests until you put in your tubes.

"Mr. Anderson: I move that the answer be stricken because it is not responsive, and because of the grounds stated [478] in the objection."

The Court: The answer may stand.

Mr. Gibson: The Court has in mind that we adopt all of these objections and motions?

The Court: The same ruling, Mr. Gibson.

Question: What I would like to know is, whether or not in the performance of this contract you were able to follow and did follow the normal sequence of construction?

Answer: No; we were not.

Question: Tell the Court why.

"Mr. Anderson: The same objection."

The Court: You may read the answer.

Answer: Well, we didn't have our water-wall tubes, or our roof tubes for No. 1 and No. 2. We didn't have our headers so that we could just keep going,—the same as an assembly line, or whatever you would want to call it.

Question: And when you ran into these delays because of the missing materials, what did you do with your crews?

"Mr. Anderson: Objected to as calling for a

(Deposition of Emil Nelson.)

conclusion, without foundation, and irrelevant and immaterial."

Answer: Well, we would have to put our crews somewhere else and keep them going until we received the materials.

Question: Did you, in fact, do that?

Answer: Why, certainly.

Question: What else did you have to do with respect to your [479] construction equipment?

Answer: Well, you have to move that where you are. In other words, your hoist and your block and tackle is rigged up to that particular work, and when you found it was short you had to move it away to something else.

Question: And then when the material came in for construction, what did you have to do again?

Answer: Move it back, of course.

Question: And what about your crews?

Answer: Shift them back.

Question: Was there any loss of efficiency as a result of shifting these crews from one job to another?

Answer: Why certainly.

"Mr. Anderson: Just a minute. I object to that as calling for a conclusion, and without foundation, and it is incompetent, irrelevant and immaterial."

Mr. Gibson: And I want to add to that: That it is calling for a conclusion and he has no basis for the knowledge. He is not able to tell.

The Court: He may answer.

(Deposition of Emil Nelson.)

Mr. Watts: I think I read the answer, but I will read it again.

Answer: Why, certainly.

Question: All right. State what happened with respect to [480] efficiency when you moved the crews from one job to another, and when you moved the construction equipment when you moved?

"Mr. Anderson: The same objection."

The Court: You may read the answer.

Question: State what the fact was.

Answer: There was a loss of time in moving your equipment.

Question: Now, in the performance of this contract was there any particular classification of work which had to be done the same on boiler No. 1, No. 2 and No. 3?

Answer: Well, all three boilers was identical, so naturally it is the same procedure, if that is what you are asking me.

Question: Now, what is ordinarily the normal method that you follow where you have three boilers to erect, so far as procedure is concerned?

"Mr. Anderson: Objected to as calling for a conclusion, and without a foundation, and incompetent, irrelevant and immaterial."

The Court: You may read the answer.

Answer: Well, shall I go ahead?

Question: Yes.

Answer: When you have got three identical things, you organize it. So many men to put up drums, and naturally that [481] gang goes from

(Deposition of Emil Nelson.)

one to another one and erects the drums. And the next gang comes behind and stick in tubes, and the third gang comes and in that way it keeps on going and then if you go further another gang makes the tests and so on.

Question: Does the man who does certain work in the first operation ordinarily pass to the second operation and perform that operation?

Answer: Why, certainly.

Question: And then to the third operation?

Answer: Why, certainly.

Question: He performs, for example, the same type of work on boiler No. 2 as was performed on No. 1? Answer: That is right.

Question: And then goes to No. 3 and performs the same work on No. 3 as heretofore performed on boiler No. 1 and No. 2; is that correct?

Answer: That is correct.

Question: Each crew works that way?

Answer: That is correct.

Question: Now, what must the superintendent of construction, and the foremen, and the laborers in these respective crews do when they come to the first operation with respect to consulting the blue prints and the like? Do you know what they do?

“Mr. Anderson: That is objected to as calling for a conclusion, and hypothetical, and incompetent, irrelevant and immaterial.”

The Court: He may answer.

Answer: When they first start there is a little

(Deposition of Emil Nelson.)

general figuring out what to do and how to do it. It is a little confusing, the same as the starting any other particular job. You read your blue prints and get the things started.

Question: Do you talk it over with the men and explain it to them?

Answer: That is right. Why, sure.

Question: Now, when you come to the second operation, are you able to perform the second operation any more efficiently or quicker than the first under normal circumstances?

"Mr. Anderson: Objected to for the same reasons."

The Court: He may answer.

Answer: Why, certainly. When you do things over and over again, why, naturally you become more familiar with what you are doing and so on. In other words, the same as an assembly line, when you have once done it it is to do it over and over again.

Mr. Watts: There seems to have been a word left out there, but I read it just as it is. I think perhaps it should read, "It is easy to do it over and over again," but [483] I will have the answer in the record just as it appears here.

Question: And to that extent, the third operation you are able to do it more quickly and efficiently than the first and second operations?

"Mr. Anderson: The same objection."

The Court: The same ruling.

Answer: Why, certainly.

(Deposition of Emil Nelson.)

Question: Now, you know about the normal length of time that is required for each one of these operations, don't you?

Answer: Yes, pretty well; yes.

Question: Tell the Court whether or not you were able to perform, or finish, your work on the first boiler as quickly as you normally would have been able to on account of these stoppages and shortages?

“Mr. Anderson: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion, and not a statement of fact.”

Mr. Gibson: I object on the same grounds, and add to it: That he is constantly injecting foreign elements into this matter. Now, he doesn't claim to know about this type of a boiler.

The Court. He may answer. This, I understand, will all be connected up. [484]

Mr. Watts: This man is the construction superintendent, and I have already put in the testimony of Mr. Borst on this matter. Now, I am giving the Court the benefit of this man's testimony, who is, as has been testified to in this deposition several times, the construction superintendent.

The Court: You may proceed, Mr. Watts.

Answer: Naturally you couldn't finish it as fast as if you could go ahead and finish it.

Question: Tell the Court whether or not the work on the first boiler in this instance took longer than normal?

“Mr. Anderson: The same objection.”

(Deposition of Emil Nelson.)

The Court: He may answer.

Answer: It certainly did; yes.

Question: And the reason it took a longer time is what?

“Mr. Anderson: The same objection.”

The Court: He may answer.

Answer: Well, delayed materials. In No. 1 the roof tubes were not there, so naturally we couldn't start the second operation and put on our tests.

Question: Now, when you came to the performance of the contract so far as the second boiler is concerned, were you able to perform that any faster than the first operation in this instance?

Answer: No; we had two more things there. That was shortage of materials. So it probably took longer than the [485] first one.

Question: And what about when you reached the erection of the third boiler?

Answer: Well, the third boiler, I would say about the same as the second.

Question: And both of them, then, took longer, actually, to construct than the first one?

Answer: That is right. In other words, we had our wall headers up for the third boiler as well, but we wanted No. 2 finished so we took the water wall header off of three and put it back on two. We spent that time on erecting the water wall header.

Question: Were you using approximately the same number of laborers and construction men on

(Deposition of Emil Nelson.)

the erection of boilers two and three as you did on No. 1?

“Mr. Anderson: Objected to as without foundation, and not the best evidence.”

The Court: He may answer. It, perhaps, is not the best evidence as to the number of men working, but he may answer.

Answer: Yes, sir.

Mr. Watts: You may take the witness. That is all of the direct examination.

Mr. Gibson: I will withhold this cross examination, with the Court's permission. [486]

The Court: Very well. You may do that, Mr. Gibson.

Mr. Watts: I will now read the deposition, if I may, of Mr. Hobbs, James A. Hobbs. This was taken on the 28th day of January, 1947, and the direct examination was by myself.

DEPOSITION OF JAMES A. HOBBS

a witness on behalf of plaintiff, having been duly sworn, testified and deposed as follows:

Direct Examination

By Mr. Watts:

Question: State your name, please, sir.

Answer: James A. Hobbs.

Question: What is your residence?

Answer: 10306 Norledge, Kansas City, Missouri.

Question: What is your trade?

Answer: Boilermaker.

(Deposition of James A. Hobbs.)

Question: How long have you been in that trade? Answer: Twenty-seven years.

Question: In the period from about July 15th, 1944, until December 19th, 1944, where and by whom were you employed, and in what capacity?

Answer: I was employed by the Power Service Company, Minneapolis, at the Sunflower Ordnance Plant, DeSoto, Kansas, [487] a boilermaker superintendent.

Question: Your wage rate during that period of time was how much?

Answer: Eighty dollars a week.

Question: Particularly during the period November 10th, 1944, to December 19th, 1944, was the rate eighty dollars a week?

Answer: Yes, but that doesn't include the overtime, you understand that. It was a forty hour week.

Question: Did you work every week during that period of time? Answer: Yes.

Question: All the time except Sundays?

Answer: I went hunting one week. I was off one week.

Question: Now, are you now, or have you ever been, a stockholder or an officer of the Power Service Corporation? Answer: No.

Question: Generally, did you know what time limit was put upon the performance of that contract at DeSoto, Kansas, in 1944, as far as Power Service Corporation was concerned?

(Deposition of James A. Hobbs.)

Answer: My understanding was from what they told me, one hundred twenty days.

Question: Now, state whether or not any shortages developed during the construction of that contract, or that job, so far as materials are concerned. [488]

Answer: You want all the material?

Question: Whether or not any shortages appeared?

Answer: Yes, we knew that when we started the job, or at least, I knew that the side wall tubes for the three boilers was not there.

Question: In other words, can you give me the date when you started to work there?

Answer: To the best of my knowledge, it was July 12th.

Question: And at that time then did you know that the side wall tubes were missing?

Answer: I did.

Question: Now, what was the effect of these shortages upon the performance of the contract out there? What resulted?

Answer: The effects on the job so far as the shortage of the wall tubes were concerned was that we put the first boiler up to a certain point where we couldn't go any further without the wall tubes. We went ahead the best we could, made as much progress as we could, but we got stopped cold on the boiler because of the tubes, and moved on to the next boiler.

(Deposition of James A. Hobbs.)

Question: Well, do you remember what kind of tubes it was that caused this first delay?

Answer: Boiler side wall tubes, that is the name of them, "water-wall tubes."

Question: Now, did you run into any errors in fabrication [489] during the performance of **that** contract?

Answer: We did.

Question: Tell what they were.

Answer: The first error we run into in fabrication was on the,—I am not positive whether it was the first or second boiler. It was the top front wall header apparently had been fabricated for another job altogether. The header was the same length but it absolutely wouldn't fit in the picture at all on the job, and they had to send it back to the Combustion Engineering Company's fabrication shop, and as I understand, used another header.

Question: Tell me why it wouldn't fit on this particular job.

Answer: Because the header was fabricated for a thirty-six front wall tube boiler, and this was a forty-eight front tube water-wall.

Question: In other words, it had more holes in it?

Answer: It didn't have enough holes in it.

Question: What other defective fabrication did you run into, if any?

Answer: On the second boiler after we got the side walls erected and the front walls erected so that it was practically impossible, so to speak, to take the headers out, we found that the holes were

(Deposition of James A. Hobbs.)

three and a half inch holes on the bottom circulator tubes, known as the bottom riser tubes, the tubes, to [490] be exact, coming out of the mud drum going into the bottom side-wall header, that they were three and a half inch holes instead of three inch. Then they had to get swedge nipples and roll into the headers and they had to get a certified welder there to make the welds on the tubes, which meant quite a lot of extra work and delay.

Question: How about delay?

Answer: Which delay?

Question: What was the effect so far as delay was concerned of this header that was improperly manufactured with only thirty-six holes?

The Court: Was this the matter, Mr. Watts, that was referred to earlier in the trial, that the plaintiff was paid for?

Mr. Gibson: He was paid for all of this work.

Mr. Watts: They were paid, I think \$114.00 for this work.

Mr. Gibson: It was only one day's delay.

The Court: You may go ahead. You might as well read the answer.

Answer: The result was that,—the top wall header has to do with the alignment of the whole boiler, and we found after we had lined up the boiler to this header it meant quite a job to take this header down and lose the alignment which we [491] had to put back when we got the other header back. Without this header you can't align the boiler.

(Deposition of James A. Hobbs.)

Question: Have you any recollection as to how long you were delayed on account of this header?

Answer: I kept no records, and have no idea how long the delay was.

Question: Do you recall whether or not there were any roof tubes improperly manufactured?

Answer: Yes; there were two roof tubes on each boiler improperly bent which we had to refabricate on the job.

Question: Did you discover any defective tubes as you went along? Answer: No.

Question: As a result of these delays what happened to the normal sequence of your performance?

Answer: Well, the normal procedure of building a boiler we had to get away from, because we would have to take men off and put them some place else and carry on with the job. Although we were delayed in a certain place, then we had to. —there is lost time and lost motion when you can't carry on the erection of a boiler under the proper sequence. That is all there is to it.

Question: Suppose you give me an example of what you mean by the ordinary sequence that is customarily followed in the [492] erection of these boilers, and what sequence was actually followed in this instance. Give me one or two or three examples, if you can, of a difference in sequence.

Answer: Well, it was a case of, we will say, for instance, a spinning gang, rolling gang. We usually start out on the generator tubes, which means the connection between the two drums. Then we move

(Deposition of James A. Hobbs.)

on to the water-walls, then to the riser tubes, and so forth, and we try to carry out, if we have got more than one boiler, we try to carry out the same gang from one boiler to do the same job on the second boiler, and the third boiler, which is the usual procedure. On those jobs we didn't do it. When we come to the place where we had to have side-wall tubes we got stopped in our tracks. We simply had to take the gang off and put them somewhere else.

Question: State whether or not there would be any lost time between moving from one job to another as a result of these delays?

Answer: I would say there is always lost time where you can't carry out the usual erection procedure.

Question: What happened with respect to the equipment that you used in this erection?

Answer: You mean so far as lost time? You mean of delay, of not operating the equipment?

Question: So far as having to tear it down and set it up again. [493]

Answer: There would be some loss there; not a whole lot.

Question: Now, as a result of all these delays taken as a whole, and taking into consideration shifting from one job to another, and the shifting of equipment from one job to another, state whether or not in your opinion it took more man-hours to perform each one of these operations than it ordinarily takes when normal sequence of operations is followed.

(Deposition of James A. Hobbs.)

Answer: Well, we couldn't carry out the usual procedure of erection, and you are bound to have lost time, lost motion. My opinion is yes, that you have delays.

Mr. Watts: That is all of the direct examination. Now, I will re-offer in evidence Exhibit 67, which is a certified copy of the Income Tax Return of the corporation.

(Whereupon document referred to was marked Plaintiff's Exhibit 67, for purposes of identification.)

Mr. Gibson: I object to it as incompetent, irrelevant and immaterial.

The Court: You have the testimony in here. I don't see that the tax statement would help the Court any.

Mr. Gibson: I will continue with the cross examination. We are now about the middle of page thirty-seven, the beginning of the cross examination.

Cross Examination

Question: Mr. Hobbs, you did the work as rapidly as you [494] could under the circumstances, didn't you?

A. Yes, sir. I would say that there was nice progress made on the job. I mean what we had to contend with. There was delays on account of materials.

Question: Were you formerly employed by Cory, Joslin & Macnsons Company?

(Deposition of James A. Hobbs.)

Answer: Yes, sir.

Question: Were a number of your forces employed at Sunflower for the Service,—for the Power Service Company also employed by Cory, Joslin & Macnsons on boiler erection work?

Answer: Some of the men worked for me on the Power Service job that worked for me when I worked for Cory, Joslin & Macnsons; yes.

Question: All of the men in your forces were familiar with all types of boiler construction, boiler erection? Answer: Yes.

Question: In an erection job of three boilers, isn't it frequently a fact that you have to move from one boiler to the other in order to accomplish a certain part of the work?

Answer: Yes; that is a fact. You don't start on any one thing and carry right on through. We go back and,—

Question: In other words, that is the normal procedure in erecting a boiler under normal conditions? [495]

A. The normal procedure,—you mean when we go from one boiler to the other and go back?

Question: Yes.

Answer: We have to do that in a number of cases; yes.

Question: Now, if these boilers were to be erected simultaneously, that is all three of them, operations on all three boilers at the same time, would you, or would you not, have erection equipment such as hoists, tube-rolling equipment and universal

(Deposition of James A. Hobbs.)

joints at each boiler, if you were working on each boiler at the same time, all three boilers?

Answer: Well, up to now I have never worked on a job where we did all three boilers at one time and finished them up at the same time.

Question: If you were carrying on your operations, I don't say necessarily finishing the boilers at one time, but if you were carrying on operations on all three boilers at one time, would it, or would it not, be necessary that you have erection equipment at each boiler? Answer: Absolutely.

Question: Then, if that is true, and you had sufficient erection equipment located to carry on erection of the three boilers at the same time, would it be necessary to move equipment from boiler to boiler?

Answer: I don't,—let's have it again. I have lost you some place. [496]

Mr. Gibson: Mr. Costolow, who was representing the District Attorney's office made the request that the Reporter read the question. Whereupon the Reporter read the following question: "Question: If you were carrying on your operations, I don't say necessarily finishing the boilers at one time, but if you were carrying on operations on all three boilers at one time, would it, or would it not, be necessary that you have erection equipment at each boiler?"

Answer: I don't know whether it is a necessity,—we do it. I have never,—I have never been on a job just exactly where we had enough equipment to,

(Deposition of James A. Hobbs.)

—that is, a thing I won't say, that a man would have to, but through my experience we have always,—I have never been in a place where we had that much equipment, if you put it that way.

Question: Then it is a normal condition on any boiler erection job where there are three boilers that you have to move equipment occasionally from one boiler to the other?

Answer: That is a fact; yes.

Mr. Gibson: And that is all of the cross examination. [497]

GEORGE EDWARD BENSON,

a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Watts:

Mr. Watts: The purpose of this testimony is to amplify some testimony heretofore offered as to the measure of damages.

Q. Will you state your name?

A. George Edward Benson.

Q. What is your address, Mr. Benson?

A. 608 Hearst Building, and 442 Cumberland Road.

Q. And your occupation is what?

A. Certified Public Accountant.

Q. You are a Certified Public Accountant?

A. Yes.

(Testimony of George Edward Benson.)

Q. Are you a graduate of any university, or universities? A. Yes.

Q. Of what universities are you a graduate?

A. The University of Illinois. [498]

Q. Of what professional societies are you a member?

A. The American Institute of Certified Public Accountants, and the State Society of California.

Q. Are you practicing your profession in California? A. Yes, sir.

Q. And have been for some time?

A. Yes, sir.

The Court: I imagine that is a sufficient qualification, is it not, gentlemen?

Mr. Gibson: We will admit his qualifications.

Mr. Scholz: Yes; I will admit them.

Q. (Mr. Watts, continuing:) Of what firm are you a member, or associated with?

A. Benson & Neff.

Q. Prior to yesterday, Mr. Benson, were you acquainted with Mr. Borst, or with anybody connected with the Power Service Corporation?

A. No; I was not.

Q. Did you ever see Mr. Borst before yesterday?

A. No, sir.

Q. Are you acquainted with the accounting methods used in the construction business?

A. Yes.

Q. That is, the methods used by construction contractors? [499] A. I am.

Q. Have you handled accounting of that kind?

(Testimony of George Edward Benson.)

A. Yes, sir; I have.

Q. Let me ask you: Is it considered sound practice to allocate the amount of office overhead to the various company activities on some fair basis?

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial.

The Court: I think to save time I will permit him to answer.

A. It is.

Q. (Mr. Watts, continuing:) Will you name some of the methods that are considered as sound practice in allocating the overhead expense?

A. The amount is allocated on the basis of direct labor, the labor man-hours; and another method is to allocate the overhead on a basis of direct labor costs; and in the manufacturing business, the overhead is sometimes allocated on the basis of machine-hours; however, that is not used in this sort of business.

Q. Is it considered sound practice to use the average number of employees on the jobs in allocating the overhead?

A. That is what I mentioned as the labor-hours, or man-hours. We reach the same result. [500]

Q. Mr. Benson, assuming now that the plaintiff company here during the period between November 10th, 1944, and December 19th, 1944, had in progress three contracts, which were as follows: First, the contract with the defendant W. E. Joslin at the Sunflower Ordnance Works, the contract price of that particular contract being \$466,821.07, and

(Testimony of George Edward Benson.)

that the average number of employees engaged in the performance of this contract during the period stated to you, November 10th, 1944, to December 19th, 1944, was eighty-nine; and assuming that the second contract in progress was with the Board of Heating Commissioners of Sleepy Eye, Minnesota, and that the total price of this contract was \$15,-956.00, and that the average number of employees on this contract during the time mentioned was four; and assuming that the third contract was with the Union Pacific Railroad Company at Salt Lake City, Utah, the total price of that contract being \$80,740.00, and that the average number of employees engaged in the performance of this contract during the time mentioned was eighteen; and assuming also that the normal annual overhead of the plaintiff company was \$75,316.58, what, in your opinion, would be a fair and reasonable allocation of plaintiff's overhead to the contract with the defendant for the period between November 10th, 1944, and December 19th, 1944, by using the average number of employees as a basis? [501]

A. \$6,452.52.

Q. Will you describe the method you have used in arriving at this sum, and state whether or not in your opinion that method is recognized as standard accounting procedure?

A. The annual overhead of \$75,316.58, which I understand to be constant throughout the year, is first allocated to the period of thirty-nine days, by multiplying thirty-nine over three hundred and

(Testimony of George Edward Benson.)

sixty-five, and that result is in turn multiplied by eighty-nine over one hundred eleven, eighty-nine being the number, or, rather, average number of men employed on the Joslin contract during the thirty-nine day period, and one hundred and eleven being the average number of men employed on all of the contracts during that period.

Q. Is that a recognized method of allocation of the overhead?

A. That is a recognized method of allocation of overhead.

Q. And by using that method you arrive at what? A. \$6,452.52.

Q. State whether or not that is a reasonable method to use in arriving at a fair overhead allocation to this contract during the thirty-nine day period? A. Yes, it is.

Mr. Watts: You may take the witness. [502]

Cross Examination

By Mr. Gibson:

Q. Mr. Benson, you used the total amount of the contract price on the Joslin contract as reported to you by the plaintiff, or by Mr. Watts, as \$466,-821.07?

A. Well, that factor is used, and it comes to eighty-three and one-half per cent of the contracts in progress at that time, that is, it was so close to that eighty-three and one-half per cent that I used that figure.

Q. You used what was reported to you as the total overhead for the twelve months period for this company? A. Yes, sir.

(Testimony of George Edward Benson.)

Q. And then broke it down on the basis of number of days on this job? A. That is correct.

Q. That was reported to you as between November 10th and December 19th, 1944?

A. That is right.

Q. And you also used the number, or average number of employees that was reported to you?

A. Yes, sir.

Q. And that gave you the balance factor to divide into the \$75,316.00 which was reported to you as annual overhead?

A. The overhead portion of the \$75,316.58 was taken for the thirty-nine days, and that result was pro-rated on the basis [503] of the average number of employees.

Q. And in determining the overhead, you do not purport to know what factors went into the overhead, or the arrival at the figure of the overhead of \$75,316.00?

A. No, sir; I don't. That is correct.

Q. Suppose that the project manager was supervising the construction job, would you consider that amount would be part of the overhead, or production cost?

A. Ordinarily, it would be charged to production cost.

Q. And supposing that he acted in the capacity of salesman for the company a part of the time in the home office, and a part of the time on sales work, and a part of the time in direct charge of operation in the field, would it be good practice to

(Testimony of George Edward Benson.)

try and arrive at a fair estimate of time divided to the various activities and to allocate them?

A. That depends on the circumstances. In some organizations they might allocate as overhead, and in some allocations they may not.

Q. A paid salesman is distinguished from a commission salesman and is considered as overhead operation?

A. That is right.

Mr. Gibson: I believe that is all.

Mr. Watts: That is all. Thank you very much, Mr. Benson. [504]

W. LYLE BORST,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Further Direct Examination

By Mr. Watts:

Q. Mr. Borst, since the commencement of the trial of this case have you received in the mail a printed compilation of the rental rates for construction equipment?

A. Yes, I have.

Q. I hand you now exhibit No. 70, and I will ask you to identify this for the record, if you please.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 70, for purposes of identification.)

A. This is a compilation of the office of Price Administration Maximum Price Regulations 134 to 136.

Mr. Watts: I request now that counsel for the

(Testimony of W. Lyle Borst.)

defendant and the Court turn to page 136 of the trial brief filed in this case for the purpose of comparing the costs, or the amounts charged by the plaintiff, in the schedule of the computation of damages with Exhibit No. 70.

Q. (Mr. Watts, continuing:) Will you tell the Court from page twenty-six of Exhibit No. 70 of the computation,—of the compilation of rental rates of the Office of Price Administration,—

Mr. Gibson (Interposing): What is Exhibit No. 70? [505]

Mr. Watts: It is the list, or compilation of ceiling prices of rental of equipment, and the purpose is to show that our prices were the same, or lower than the ceiling price which was in effect at that time.

The Court: Of course this matter would be such a matter that would be taken notice of by the Court. The Court would take judicial notice of this, and I presume the only reason it would be introduced would be for the convenience of the Court. It would be the same as introducing a statute to show what the law is. I will admit it in evidence, simply for that purpose, only to have it in the record for the convenience of the Court, in order that he may, if he desires, check the ceiling prices with the evidence introduced. Certainly, I can see no purpose of going over this item by item.

Mr. Gibson: That is true. That is just the same as offering a law book for the Court.

The Court: Yes; I think that is right, but it may be of some help. In fact, it may be of con-

(Testimony of W. Lyle Borst.)

siderable help to the Court. It may be admitted.

(Whereupon Plaintiff's Exhibit No. 70, for identification, was admitted in evidence.)

Mr. Watts: You may cross examine.

Cross Examination

By Mr. Scholz: [506]

Q. We have a great deal of evidence before the Court here, Mr. Borst, now just to get the facts straight, as I understand it, I understand at this time that you are suing,—I mean the Power Service Corporation is suing for breach of contract dated July 11th, 1944?

A. The final contract is dated, I think, September 7th.

Mr. Watts: I believe it is in evidence as Exhibit 2? A. Yes, sir.

Q. (Mr. Scholz, continuing:) For the purpose of refreshing your memory, I hand you Exhibit No. 2.

Mr. Watts: We will admit, if that is what counsel wants, that the contract is dated July 11th. It shows it is dated July 11th.

Mr. Scholz: That is what I said.

Q. (Mr. Scholz, continuing:) Plaintiff is suing the defendant for a breach of that contract, is that correct? A. Yes.

Q. And that breach is based on the fact, or on the alleged fact that this agreement states, or should have stated, that all essential or necessary materials for the erection of Power House No. 1 was stored on the project before you made your bid?